Supreme Court, U. S.
FILED
JUL 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Petitioners, Fred G. Burke, Commissioner of Education of the State of New Jersey, Ruth H. Mancuso, President of the New Jersey State Board of Education and the New Jersey State Board of Education,
State House Annex,
Trenton, New Jersey 08625.

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel.

MARK SCHORR,
Deputy Attorney General,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT—Implicating the maintenance of a proper balance between federal and state jurisdictions, the issues presented are substantial and far-ranging and involve as well a conflict with decisions of this and other federal appellate courts and therefore in the interest of the effective administration of justice require this Court's guidance	6
A—Certiorari should be granted to resolve whether the non-intervention doctrine of Younger v. Harris applies where a prior state suit instituted by federal plaintiffs involves an issue of deep state concern and where both the parties and the state court have invested considerable time in the case	8
B—Certiorari should be granted because the court below construed the holding of England v. Louisiana Bd. of Medical Examiners in a manner not warranted by any holding of this Court and because such interpretation is at cross purposes with England	14

PAGE

C—The holding of the court below that a state court judgment on a cause of action is not res judicata of federal claims not raised in that action is contrary to settled principles of constitutional adjudication and creates a conflict among the circuit courts which can only be resolved by an authoritative ruling of this Court 18

CONCLUSION 21

Appendix:

A—Opinion of the United States Court of Appeals for the Third Circuit of May 3, 1978 .... 1a

B—Opinion Amplifying Oral Opinion of the United States District Court for the District of New Jersey of April 22, 1977 ..... 31a

C—Order of the Superior Court of New Jersey, Appellate Division of October 15, 1976, Denying Stay 37a

D—Order of the Superior Court of New Jersey, Appellate Division of November 17, 1976, Denying Stay 39a

E—Order of the Superior Court of New Jersey, Appellate Division of April 25, 1977, Granting Stay 41a

F—Opinion of the Superior Court of New Jersey, Appellate Division of July 12, 1977 ..... 43a

G—Order of the Supreme Court of New Jersey of July 20, 1977, Denying Petition for Certification 47a

PAGE

Cases Cited

Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975) 10

Angel v. Bullington, 330 U.S. 183 (1947) 18

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 19

Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970) 18

Cornwell v. Ferguson, 545 F.2d 1022 (5th Cir. 1977) 18

Del Rio v. Kavanaugh, 441 F. Supp. 220 (E.D. Mich. 1977) 10

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) 2, 7, 14-17, 19

Fisher v. Civil Serv. Comm'n, 484 F.2d 1099 (8th Cir. 1973) 17

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 9, 13

Ingraham v. Wright, 430 U.S. 651 (1977) 12

Juidice v. Vail, 430 U.S. 327 (1977) 9, 10, 13, 20

Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), vacated & remanded on other grounds 435 U.S. ——, 98 S. Ct. 1642 (1978) 19

Lecci v. Cahn, 493 F.2d 826 (2d Cir. 1974) 17

Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), cert. den. 420 U.S. 976 (1975) 19

Louisville Area Inter-Faith Comm. v. Nottingham Liquors, Ltd., 542 F.2d 652 (6th Cir. 1976) 10

Lovely v. Laliberte, 498 F.2d 1261 (1st Cir.), cert. den. 419 U.S. 1038 (1974) 18

PAGE

Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), cert. den. 415 U.S. 593 (1974) 10

Merrick v. Merrick, 441 F. Supp. 143 (S.D.N.Y. 1977) 10

Orlando v. Wizel, 443 F.Supp. 244 (W.D. Ark. 1978) 10

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 4, 7, 14, 16

Rankin v. State of Florida, 418 F.2d 482 (5th Cir. 1969), cert. den. 397 U.S. 1039 (1970) 17

Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) 18

Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), cert. den. 414 U.S. 1974 (1971) 11

Roy v. Jones, 484 F.2d 96 (3d Cir. 1973) 19

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 18

Spence v. Latting, 512 F.2d 93 (10th Cir. 1975), cert. den. 423 U.S. 896 (1976) 18

Stone v. Powell, 428 U.S. 465 (1976) 12

Trainor v. Hernandez, 431 U.S. 434 (1977) 9, 12, 13

United States v. O'Malley, 383 U.S. 627 (1966) 21

Will v. Calvert Fire Ins. Co., —— U.S. ——, 46 U.S. L.W. 4811 (decided June 23, 1978) 13

Younger v. Harris, 401 U.S. 37 (1971) 2, 4-14, 20

New Jersey Constitution Cited

Art. VIII, Sec. IV, Para. 1 (1947) 11

PAGE

Statutes Cited

N.J.S.A. 18A:7A-5(g) 11

28 U.S.C.:

Sec. 1254(1) 2

42 U.S.C.:

Sec. 1983 .....3, 4, 8, 18

Rule Cited

Rule 19(b) 21

Regulations Cited

N.J.A.C. 6:11-8.8 3

N.J.A.C. 6:11-8.9 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 3, 1978.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is appended to this petition as Appendix A. It is as yet unreported. The United States District Court for the District of New Jersey issued an unreported letter opinion. It appears as Appendix B to this petition.

Jurisdiction

The judgment and opinion of the Court of Appeals were filed on May 3, 1978. The jurisdiction of the Court is therefore invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

Questions Presented

1. Is this Court's non-interference doctrine announced in *Younger* v. *Harris* limited to pending state criminal and quasi-criminal proceedings and thus not applicable where there is pending a prior state proceeding involving the same issues as the federal suit and where the subject of the suit is a matter of state concern and both the parties and the state court have invested considerable time in the case?

2. Does this Court's decision in *England* v. *Louisiana State Bd. of Medical Examiners* preclude a federal litigant who has without reservation litigated federal claims in a state court and then failed to seek review of the state court decision in this Court from relitigating those claims in a federal district court proceeding involving the same parties as the state suit?

3. Is a state court judgment on the merits of federal constitutional questions *res judicata* of federal issues in a subsequent federal suit under 42 U.S.C. §1983, which issues were not, but could have been, raised in the state proceeding?

Statement of the Case

The jurisdiction of the district court was invoked because a question arose under the Civil Rights Act of 1871, 42 U.S.C. §1983.

This case arises out of two actions brought on behalf of approximately 900 teachers of bilingual and bicultural education and English as a Second Language employed by some 30 local school districts throughout the State of New Jersey. They are respondents here. Both were challenges brought on a variety of grounds to regulations of the New Jersey State Board of Education governing the certification of bilingual and bicultural teachers and teachers of English as a Second Language. N.J.A.C. 6:11-8.8, -8.9. The state and its educational officials, petitioners here, were defendants in both suits.

One of the suits was commenced on October 14, 1976 in the Appellate Division of the Superior Court of New Jersey. It attacked the aforementioned regulations on a number of federal constitutional grounds and as violative of New Jersey law. During the pendency of that suit, respondents three times sought an *ad interim* stay of the challenged regulations. The first application was denied by one judge of the Appellate Division by order dated October 13, 1976 (App. C). The second was denied without prejudice by three judges by order dated November 13, 1976 (App. D). Finally, by order dated April 25, 1977, the court granted respondents' third application for a stay (App. E).

In a decision on the merits dated July 12, 1977, the state court rejected respondents' claims, finding the regulations proper in all respects, and dissolved the stay (App. F). The Supreme Court of New Jersey denied respondents' petition for certification (App. G), and respondents made no attempt to seek review in this Court.

During the pendency of the state court action, on November 22, 1976, respondents filed suit in the United States District Court for the District of New Jersey challenging the regulations on a number of federal constitutional grounds under 42 U.S.C. §1983.* On petitioners' motion that action was dismissed. In an unreported letter opinion of April 22, 1977, the court exercised its discretion to abstain under *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), on the basis that resolution of state law issues raised in the state suit might make decision by the federal court on respondents' constitutional claims unnecessary (App. B at 32a). The district court also noted that the action was one seeking an injunction against the implementation of state regulations pending a decision on their validity. And since that specific relief had already been denied by the state court, respondents were in effect asking for a reversal of that court's determination. To grant such relief, said the court, would run counter to the principles of comity, equity and federalism and the teaching of *Younger* v. *Harris*, 401 U.S. 37 (1971), which counsels non-interference with state judicial functions (App. B at 33a to 34a).

---

* Raised and decided in the state action were respondents' allegations that the regulations were violative of the equal protection and due process clauses. In the federal suit, respondents raised those issues as well as contentions involving *ex post facto* violations, impairment of the obligations of contract, and uncompensated taking of private property.

On appeal, the United States Court of Appeals for the Third Circuit reversed the determination of the district court and remanded the cause. It held that *Younger* would not apply to a situation where the only pending proceeding was a civil suit filed by a federal plaintiff in state court (App. A at 7a). The court further expressed its belief that the *Younger* doctrine did not encompass a case where a federal plaintiff sought interference with neither a state criminal proceeding nor an attempt by a state to enforce its laws in its own forum (App. A at 11a). As to the *res judicata* effect of the state court judgment, the court held that it precluded federal consideration of only those issues actually raised in the state proceeding and that issues that could have been presented in the state forum, but were not, could be heard by the district court (App. A at 25a). Finally, after acknowledging that respondents had exposed some of their federal claims for consideration by the state court without informing the state court that they wished to reserve those claims for the federal forum, the court directed that the district court decide whether the federal claims raised in the state court were fully and freely litigated there (App. A at 29a to 30a).

REASONS FOR GRANTING THE WRIT

Implicating the maintenance of a proper balance between federal and state jurisdictions, the issues presented are substantial and far-ranging and involve as well a conflict with decisions of this and other federal appellate courts and therefore in the interest of the effective administration of justice require this Court's guidance.

The petition presents several questions of substantial importance and far-reaching effect involving a federal court's dismissal of a suit before it where the court defers to state proceedings instituted before the federal action is begun. The issues raised have not until now been considered by the Court and implicate considerations important to any federal litigant. But more importantly, resolution of these questions is vital to the proper administration of a dual federal-state judicial system, particularly in light of the always increasing caseloads in the federal courts and the need, so often acknowledged by the Court, to limit duplicative and wasteful litigation.

The first question raised is whether the non-intervention doctrine of *Younger* v. *Harris,* 401 U.S. 37 (1971), is applicable in a civil proceeding involving issues of primary importance to the state where the prior pending state proceeding involves the same parties and issues as the federal action and where the state court and the litigants have already invested considerable time and energy in the suit. The issue is of great concern not only to the litigants, but also to the courts and the public. The type of tension between federal and state jurisdiction which a federal court seeks to avoid by exercising restraint under *Younger* has been the subject of a great volume of recent litigation as courts have begun to apply

its principles to a broad range of state and private interests. The need to ease this tension is especially urgent given the increasing congestion on the federal and state dockets with not an insignificant amount of that congestion caused by duplicative litigation such as that involved in this suit. The most recent pronouncements of this Court indicate clearly its intent to expand the *Younger* doctrine to encompass precisely the type of case presented here. In stark contrast to those pronouncements and to the unmistakable trend in lower federal courts, the holding of the court below essentially limits *Younger* to criminal or quasi-criminal proceedings. While such a decision might have been plausible when *Younger* was first decided, it is unsupportable now that this Court has sanctioned application of its principles to at least some purely civil proceedings. The issue then is one on which the litigants, the public, and both federal and state courts are in need of guidance.

This appeal also projects the issue of whether a party must make an affirmative reservation of rights to return to the federal forum once he has been remitted to a state court by a federal court abstaining under *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941). The court below held that no such reservation is necessary, that holding representing a clear departure from the procedure outlined in *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964). Furthermore, it is contrary to the interpretations placed on *England* by virtually every other federal court which has construed it and finds no support in other decisions of the Court. The decision below then undercuts the beneficial purposes of *England.* It will subject litigants to unnecessary federal adjudication of issues seemingly settled in state courts. And it will compel federal courts to squander their valuable time and energy in relitigation of suits already concluded on their merits before state tribunals.

Finally, this petition raises the issue of whether a state court judgment is *res judicata* of federal claims not considered by the state tribunal and raised in a subsequent federal suit under 42 U.S.C. §1983 on the same cause of action. The issue is a clear cause of conflict among the circuits, the holding of the court below in the instant case adopting the minority position. It is worthy of consideration by the Court not only because of this conflict and because the area is one in which uniformity is required, but also because the holding of which review is sought practically encourages a litigant who would in any case be inclined to file multiple suits to split a cause of action over two jurisdictions in hope of obtaining the desired result in one. Such piecemeal adjudication is, of course, the very circumstance the policies underlying the *res judicata* doctrine are meant to avoid. Only an authoritative ruling by this Court can settle this much-litigated issue.

A

Certiorari should be granted to resolve whether the non-intervention doctrine of *Younger* v. *Harris* applies where a prior state suit instituted by federal plaintiffs involves an issue of deep state concern and where both the parties and the state court have invested considerable time in the case.

Non-intervention under *Younger* v. *Harris, supra* has its origins in the principles of comity, equity and federalism, which counsel that federal courts maintain a proper respect for state functions and recognize that this country is made up of state governments and that the federal government will function best when the states are left to discharge their own responsibilities in their own way. 401 U.S. at 44. *Younger* then represents an accommodation designed to insure the smooth functioning of both state and federal governments, an accommodation that is becoming more important, and at the same time more difficult, to maintain with the current expansion of federal dockets.

Although the *Younger* doctrine was announced in the context of an attempt by a defendant in a state prosecution to have a federal court enjoin that prosecution, its reach has been extended considerably and *Younger* principles have been applied by this Court to civil actions in three cases. *Trainor* v. *Hernandez,* 431 U.S. 434 (1977); *Juidice* v. *Vail,* 430 U.S. 327 (1977); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975). In all three, the Court reserved decision on whether these principles were applicable to all civil litigation. 431 U.S. at 444-45 n.8, 430 at 336 n.13; 420 U.S. at 607.

In any case, it is safe to say that the law in the area is in a state of transition. For although the *Younger* doctrine has been invoked by the Court in civil litigation in cases involving some sort of enforcement by a state or its courts, the Court has at the same time broadly suggested that its application may be proper whenever a state court has become involved in a private action and one of the parties to the suit seeks to raise in a federal forum an issue he had raised or could have raised in the ongoing state proceeding. See *Juidice* v. *Vail, supra; Huffman* v. *Pursue, Ltd., supra.* In *Huffman,* the Court declared it would not permit a party "the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which . . . is quite costly to the interests *Younger* seeks to protect." 420 U.S. at 606-7. And in *Juidice,* it held that *Younger* erected a barrier to a federal civil rights challenge to New York's statutory contempt procedures by individuals subject to and ultimately

jailed under such procedures. In doing so, the Court found as a sufficient ground for invoking *Younger* that plaintiffs in the §1983 action "had an *opportunity* to present their federal claims in the state proceeding." 430 U.S. at 335 (emphasis original).

Thus, it is wholly consistent with the underpinnings of *Younger* for a court to apply the doctrine to a case which involves, as does the instant one, a subject of especial concern to the state or where, as here, the parties had an opportunity to present their federal claims in a prior state proceeding. In *Juidice,* a case which arose out of a state action between private parties, the Court indicated unequivocally that what matters in *Younger* non-intervention is not so much the character of the state proceedings—*i.e.,* whether they are civil, criminal, or quasi-criminal—but rather that the subject matter of the suit is one in which the state has an interest and that the notion of comity is thereby implicated. 430 U.S. at 334. Accordingly, lower federal courts have found equitable restraint under *Younger* and its more recent progeny warranted in a wide variety of cases—some of which involve the state, some of which do not—that are wholly unconnected with the criminal or quasi-criminal process. See *e.g., Louisville Area Inter-Faith Comm.* v. *Nottingham Liquors, Ltd.,* 542 F.2d 652 (6th Cir. 1976) (labor dispute); *Ahrensfeld* v. *Stephens,* 528 F.2d 193 (7th Cir. 1975) (eminent domain); *Lynch* v. *Snepp,* 472 F.2d 769 (4th Cir. 1973), *cert.* den. 415 U.S. 593 (1974) (access to public schools); *Orlando* v. *Wizel,* 443 F.Supp. 244 (W.D. Ark. 1978) (guardianship proceedings); *Del Rio* v. *Kavanaugh,* 441 F. Supp. 220 (E.D. Mich. 1977) (disciplinary proceedings against former judge); *Merrick* v. *Merrick,* 441 F. Supp. 143 (S.D.N.Y. 1977) (domestic relations).

That the state has a profound interest in the subject matter of this suit is unassailable. By constitution, New Jersey guarantees to its school age children a "thorough and efficient" system of free public schools. N.J. Const. (1947), Art. VIII, §IV, ¶1. And the state's highest court has declared this guarantee preeminent among those in the state constitution. See *Robinson* v. *Cahill,* 62 N.J. 473, 303 A.2d 273 (1973), *cert.* den. 414 U.S. 986 (1971). The adoption of licensure standards to ensure the competence of those who teach in the state's public schools, the subject of this action, is a major component of that constitutional promise. N.J.S.A. 18A:7A-5(g).

The state was also deeply interested in this case, and remains so, because its courts have invested considerable time and energy in the matter. At the time of the federal court's dismissal, the case had been pending in the state court for some six months. The state tribunal had twice considered—and rejected—applications by respondents for a stay and the case was practically ready for disposition on the merits. Indeed, by the time the Third Circuit rendered its ruling, New Jersey's highest court had refused to review the lower court judgment on the merits and the time within which respondents could have sought review in this Court had run out. Non-intervention by the district court in this context was therefore not only consistent with *Younger,* but necessary to give the doctrine its full beneficial effect. It would have avoided—and in fact did avoid—the risk of interference with, and embarrassment of, a state court. Indeed, because respondents sought in the federal court relief that had previously been denied them by the state tribunal (a preliminary injunction against the enforcement of the regulations), it is difficult to imagine how more potential for conflict could have been present. On the other hand, precluding the application of the doctrine in these circumstances serves only

to encourage duplicative litigation and to reflect negatively on the ability of a state court to adjudicate federal claims. *Trainor* v. *Hernandez, supra* at 446.

This last factor is significant and impacts upon the confidence of litigants, as well as that of the public, in state court proceedings. The at least implicit doubt running through the opinion below as to a state court's ability to deal with federal constitutional issues runs sharply counter to recent pronouncements by the Court on the subject. The Court has been more frequently remitting parties to their state remedies and in doing so has relied expressly upon the availability and adequacy of those remedies. See, *e.g., Ingraham* v. *Wright,* 430 U.S. 651 (1977); *Stone* v. *Powell,* 428 U.S. 465 (1976). In *Stone* particularly, it was suggested that actions of federal courts should be undertaken, and federal remedies fashioned, with due regard for relief available in state courts:

> ". . . Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states." 428 U.S. at 494 n. 35.

In sum, no prior decisions of the Court even suggest that the principles of *Younger* are limited, as the court below held they should be, to criminal prosecutions and enforcement actions by states in their own courts. The interests *Younger* seeks to protect extend much further than that. They encompass, as noted above, the avoidance of federal-state tension in areas of interest to states and the needless embarrassment to states that results from

a federal decree clashing with one entered by a state court.

In this connection, it should also be noted that the issues raised in this case bear heavily upon concerns recently expressed by the Court in *Will* v. *Calvert Fire Ins. Co.,* —— U.S. ——, 46 U.S.L.W. 4811 (decided June 23, 1978). In *Will,* a defendant to an action brought in an Illinois court who had raised Rule 10(b)(5), promulgated under the Securities Act of 1934, as a defense to such action brought a later federal complaint under Rule 10(b)(5) seeking damages. The district judge to whom the federal case was assigned stayed the action, deferring to the state court. The Court found that deferral proper, citing as sufficient reason therefor the avoidance of "dupliactive litigation and the concomitant tension between state and federal courts." 46 U.S.L.W. at 4813. These interests, analogous to the ones underlying *Younger* non-intervention, were served as well by a dismissal of the complaint in the instant case. And what the Court said in *Will* applies to this case inasmuch as the disposition by the Third Circuit promotes wholesale duplication of judicial effort and an unseemly race to *res judicata.*

These factors and the others set out above are all undeniably at work here. All were given short shrift by the court below. This petition then provides the Court with an opportunity to answer questions clearly contemplated by *Trainor, Juidice* and *Huffman.* It also provides an opportunity for the Court to give guidance to lower courts in this area of federal-state relations, in which there is an ever-increasing number of judicial pronouncements as courts have assessed the applicability of *Younger* to a wide variety of civil matters. Indeed, this case provides a particularly compelling context for such guidance. At once it involves areas of undeniable state inter-

est and satisfies the principal predicate for invocation of the doctrine—the pendency of prior state proceedings. And the state suit was one instituted by respondents themselves and grounded on the very same constitutional claims as were raised in the federal action. Rather than abandoning their claims in the state forum, respondents vigorously pursued them to judgment. So unlike their counterparts in *Younger* and the more recent cases extending its reach, respondents voluntarily entered the state court and were never sent away to litigate in a forum not of their own choosing.

A writ of certiorari should therefore issue to consider these important questions, to allow the Court to clarify its recent pronouncements under *Younger,* and to provide guidance to lower federal courts which are more and more confronted with the task of attempting to ease federal-state tension and clear their busy dockets for suits that will not be litigated elsewhere.

B

Certiorari should be granted because the court below construed the holding of *England* v. *Louisiana Bd. of Medical Examiners* in a manner not warranted by any holding of this Court and because such interpretation is at cross purposes with *England*.

The proper course of action for litigants who are, as were respondents, remitted to a state forum by a federal court abstaining under *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941), and who wish to have their federal issues considered by the federal court is clearly set out in *England* v. *Louisiana Bd. of Medical Examiners,* 375 U.S. 411 (1964). Plaintiffs in *England* initially filed suit

in federal district court seeking injunctive relief against a certain Louisiana regulatory statute and a declaration of its constitutionality. The district court abstained, believing that an authoritative ruling on state law might end the controversy. Plaintiffs did not restrict the state proceedings to a review of state issues. They also raised their federal claims in that forum. Returning later to the federal court, they were met with a motion to dismiss. Since the state tribunal had passed on all of the issues, the federal court granted the motion.

This Court said that such a record would normally warrant affirmance. It reversed only because the primary reason for plaintiffs' having litigated their federal claims in state court was the district court's mistaken belief that they had to do so. The Court in *England* made clear, however, that once a litigant has exposed his federal claims to decision by a state court, he is foreclosed from returning to the federal forum with them:

> ". . . We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, then—whether or not he seeks direct review of the state decision in this court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

The record in the instant case demonstrates that respondents unequivocally and without reservation litigated their federal claims in the courts of New Jersey. Those courts were never informed that there was a pending federal suit challenging the same regulations, let alone that respondents wished to reserve their constitutional issues for disposition by a federal court. Respondents proceeded in that manner notwithstanding that they had be-

fore them the plain teaching of *England* as a guide for ensuring a subsequent federal hearing.

With that factual complex before it and with its explicit recognition that respondents had in fact fully litigated without reservation some of their federal claims in the state suit (App. A at 29a n.57), the court below nevertheless remanded the matter for a factual determination as to whether those issues were "fully and freely litigated in the state courts." (App. A at 30a). By concentrating its attention on this factor and ignoring its own finding that no reservation had been made, the court has significantly changed the test set out in *England* and greatly undercut the purposes it was meant to serve: decreasing the cost and length of litigation and eliminating a potential source of friction between state and federal courts. 375 U.S. at 419. For this holding creates a new type of hearing to determine compliance with *England* and results in a corresponding deemphasis on the significance of an affirmative reservation of rights before a state court. And all of this is especially dangerous to the beneficial purposes of *England* in view of the increasing tendency of parties to file suit on the same cause of action in more than one jurisdiction.

Furthermore, this holding represents a significant departure from the procedure virtually commanded in *England,* which departure finds no support in decisions of this Court and is at odds with the interpretations given *England* by virtually every other lower federal court which has considered cases in procedural postures virtually identical to that here. Those courts have uniformly held that when a plaintiff is sent to a state court under *Pullman* and elects to expose his federal claims to judgment there, his election is irreversible and he cannot return to a federal court unless he has placed an explicit reservation of

rights in the state court record. See, *e.g., Lecci* v. *Cahn,* 493 F.2d 826, 829 (2d Cir. 1974); *Fisher* v. *Civil Serv. Comm'n,* 484 F.2d 1099, 1101 (8th Cir. 1973); *Rankin* v. *State of Florida,* 418 F.2d 482, 485-86 (5th Cir. 1969), *cert.* den. 397 U.S. 1039 (1970).

This unprecedented holding can only be termed a distortion of both the letter and spirit of *England* and a disservice to its purposes. It will most certainly result in unnecessary litigation and unfairly subject parties to needless federal relitigation of issues seemingly settled by state adjudications. With that, there will of course be a corresponding increase of federal-state tension, the very circumstance the Court in *England* said it wished to avoid. The decision below therefore raises important issues. It also involves a direct conflict with *England,* a conflict which will have an obviously adverse impact on many cases already pending. A writ of certiorari should issue so that the Court can consider the question and resolve the apparent conflict between the decision of the Third Circuit and the explicit instructions set forth in, if not the holding of, *England.*

C

The holding of the court below that a state court judgment on a cause of action is not *res judicata* of federal claims not raised in that action is contrary to settled principles of constitutional adjudication and creates a conflict among the circuit courts which can only be resolved by an authoritative ruling of this Court.

The usual rule governing the *res judicata* effect of repetitious suits involving the same cause of action is that when a court of competent jurisdiction enters a final judgment on the merits, the parties are bound by that ruling not only as to matters actually litigated in the suit but also as to matters which could have been litigated. *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 578-79 (1974). This Court has found that rule applicable even where federal issues have been adjudicated by state courts. *Angel* v. *Bullington,* 330 U.S. 183, 186-87 (1947).

Nowithstanding such clear pronouncements, there exists a deep division among the circuits as to whether a state court judgment has a preclusive effect on a subsequent federal suit under 42 U.S.C. §1983 based on the same cause of action. Most circuits, adhering to established *res judicata* principles, hold that a state judgment on the merits precludes not only the assertion of claims it has resolved, but also legal theories that might have been raised. See *Red Fox* v. *Red Fox,* 564 F.2d 361, 363 (9th Cir. 1977); *Cornwell* v. *Ferguson,* 545 F.2d 1022, 1026 (5th Cir. 1977); *Spence* v. *Latting,* 512 F.2d 93, 99 (10th Cir. 1975), *cert.* den. 423 U.S. 896 (1976); *Lovely* v. *Laliberte,* 498 F.2d 1261, 1264 (1st Cir.), *cert.* den. 419 U.S. 1038 (1974); *Coogan* v. *Cincinnati Bar Ass'n,* 431 F.2d 1209, 1211 (6th Cir. 1970). With its decision in this case,

the Third Circuit has lined up with the two others which have held that a state court judgment bars a litigant from pressing a §1983 action only on grounds raised before, and then decided by, the state court.* *Kurek* v. *Pleasure Driveway & Park Dist.,* 557 F.2d 580, 594-95 (7th Cir. 1977), vacated & remanded on other grounds 435 U.S. ——, 98 S. Ct. 1642 (1978); *Lombard* v. *Board of Educ.,* 502 F.2d 631, 635-37 (2d Cir. 1974), *cert.* den. 420 U.S. 976 (1975).

This is a conflict which cannot be ignored. Plainly, it involves an issue on which uniformity throughout the federal system is necessary not only because of the number of cases affected but because litigants, and the courts as well, must know which, if any, national constitutional and statutory rights may be asserted in a federal civil rights suit after a state judgment on the same cause of action has been entered.

While the court below suggested that no harm results from the course it followed and that to hold otherwise would discourage litigants from venturing into state courts to exhaust their remedies there for fear of forfeiting their right to a federal hearing, it failed to recognize that any complainant who wishes federal factfinding on federal issues has only to follow well-established procedures in order to restrict the state court to consideration of state issues. *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970); see *England* v. *Louisiana State Bd. of Medical Examiners, supra.* On the other hand, there is no answer to the reasons which support the holdings of courts which do not

---

* The court below did acknowledge that its holding was inconsistent with dictum in another Third Circuit opinion. See *Roy* v. *Jones,* 484 F.2d 96, 100-01 (3d Cir. 1973).

allow a party to relitigate federal claims he has raised, or has had an opportunity to raise, elsewhere. Briefly stated, they are the policies which underlie the *res judicata* doctrine—prevention of repetitious and vexatious litigation by encouraging a party to present all federal claims in one proceeding.

Moreover, a decision such as that rendered below actually encourages piecemeal adjudication and duplicative litigation of what may be a wholly federal controversy as litigants attempt to split a suit over two courts in hope of obtaining a favorable result from one. At the same time, federal courts will undoubtedly be confronted with prickly problems as to whether the federal issues were actually raised before, and then decided by, a state court.

And this is not a case where respondents were forced to litigate constitutional claims in a state court against their will. As already noted, their faith to the federal forum was never constant. Respondents freely entered the state court first, exposed their federal claims to judgment there, and never expressed to that court that they intended to do otherwise.

It should also be noted again that the demands of *Younger,* if not those of *res judicata,* are satisfied where parties are "accorded only an opportunity to pursue their constitutional claims in the ongoing state proceedings, . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." *Juidice* v. *Vail, supra* at 337 (citation omitted).

This aspect of the opinion below then seeks to avoid principles of *res judicata* settled long ago by this Court and others and in so doing to allow a litigant to split a federal controversy over two jurisdictions in the hope

of prevailing in one. The writ should issue to review that conclusion alone. But where, as here, there exists a clear conflict among the circuits on an issue of obvious significance, there can be no question but that certiorari should be granted. Rule 19(b); see *United States* v. *O'Malley,* 383 U.S. 627, 630 (1966). Finally, the issue is one often litigated and therefore of interest to anyone contemplating the assertion of a claim under the Civil Rights Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Petitioners, Fred G. Burke, Commissioner of Education of the State of New Jersey; Ruth H. Mancuso, President of the New Jersey State Board of Eduction; and the New Jersey State Board of Education

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 77-1828

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSIAC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Appellants,

v.

FRED G. BURKE, Commissioner of Education, as Commissioner and Individually, RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

C.A. No. 76-2230

Appendix A

Argued February 24, 1978

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*, and BECHTLE, *District Judge.**

WILLIAM S. GREENBERG
Greenberg & Mellk
Trenton, New Jersey 08608

Attorneys for Appellants

WILLIAM F. HYLAND
Attorney General of New Jersey
Trenton, New Jersey 08625

ERMINIE CONLEY
Deputy Attorney General
Of Counsel

MARK SCHORR
Deputy Attorney General
On the Brief

Attorneys for Appellees

OPINION OF THE COURT

(Filed—May 3, 1978)

ADAMS, *Circuit Judge*

Legal precepts tend to expand, inexorably and sometimes imperceptibly. This is so, at least in part, because a broadly-formulated legal principle is by its very nature

---

* Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

applicable to a wide range of situations. In any particular case, advocacy impels each party to claim the benefit of a potentially applicable doctrine, and in the absence of countervailing principles, consistency leads courts to decide in accordance with the suggested rule. But as a doctrine travels beyond the circumstances which generated it, the reasons which gave rise to that doctrine grow more attenuated, and the court is progressively more likely to encounter off-setting policies not present in the original application.

The abstention doctrine of *Younger* v. *Harris* has undergone such an expansion in recent years, as its equitable barrier to federal intrusion upon pending state prosecutions has been broadened to encompass a variety of other proceedings. In the present case, where we are called upon to review the application of *Younger* to a civil proceeding in which the state is a defendant, we must determine whether, in this new setting the policies undergirding *Younger* are sufficiently applicable to warrant further extension of the rule.

A. THE FACTS

On September 15, 1976, the New Jersey State Board of Education amended regulations governing the qualifications of teachers in bilingual/bicultural education programs so as to require that all teachers—whether or not they held tenure—attain fluency in English, even if their teaching is conducted in Spanish. A month later, a statutory appeal from those regulations was filed in the New Jersey Superior Court on behalf of a class consisting of all bilingual/bicultural education teachers in New Jersey.

Appendix A

Upon being assured that no teacher would be terminated as a result of a denial of interlocutory relief, the Superior Court, without prejudice, denied a motion "for Emergency Ad Interim Stay of Enforcement". On November 17, 1976, the Superior Court again denied a motion for interim relief without prejudice.

The class thereupon, on November 22, 1976, filed an action in the New Jersey District Court. The federal action challenged the regulations under 42 U.S.C. § 1983,[1] on a number of constitutional grounds, and requested injunctive relief and declaratory judgment. After a hearing held on April 22, 1977, Judge George Barlow dismissed the complaint, on the ground that *Younger* v. *Harris,*[2] interdicted injunctive relief, despite the teachers' offer to dismiss their state court action.[3] An appeal from that dismissal was timely filed.

---

[1] The complaint alleged violations of the equal protection and due process clause as well as *ex post facto* violations, impairment of the obligations of contact, and uncompensated taking of private property.

[2] 401 U.S. 37 (1971).

[3] Judge Barlow also concluded that it was appropriate for him to abstain from deciding this case under the doctrine of *Railroad Commn. of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). Since questions were raised as to the proper effect to be given to the challenged regulation (*e.g.* availability of waivers) and the propriety of the regulation on state law grounds, it would seem that *Pullman* abstention was not inappropriate as a means of avoiding unnecessary decision of constitutional issues. However, *Pullman* does not authorize dismissal. *See American Trial Lawyers* v. *New Jersey Supreme Court,* 409 U.S. 467 (1973) (trial court's dismissal on *Pullman* grounds reversed; Supreme Court held that "proper course" is to retain jurisdiction). In any event, since a final adjudication of the propriety of the regulations on state law grounds has occurred, the strictures of *Pullman* have been fulfilled.

Appendix A

In the interval between Judge Barlow's order and the oral argument before us, there were several relevant developments in the state courts. Thus, on April 25, 1977, the New Jersey Superior Court granted a stay against the operation of the challenged regulation. However, on July 12, 1977, the Superior Court sustained the regulations in a three-page per curiam opinion. That opinion, in addition to rejecting a number of purely state law challenges, held that the regulations were not "arbitrary or unreasonable" and went on to state:

> To the extent appellants are concerned with that which they describe as an "irrefutable presumption," disfavored in law . . . we observe that the result in *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) would unquestionably have been different had Berger there had the opportunity for individual review provided here. . . . We leave the application of the regulations to any individual to the particular record he established in such a case.[4]

The teachers' request for certification was denied by the New Jersey Supreme Court, and no attempt was made to seek review in the United States Supreme Court.

---

[4] Aa 76. The brief submitted in the New Jersey state court case was substantially equivalent on constitutional issues to the one submitted to our Court, raising equal protection, and due process challenges. It did not deal with the allegations in the federal complaint of *ex post facto* violations, unconstitutional impairment of the obligation of contracts, or uncompensated taking of private property.

New Jersey now contends that the appeal from the district court should be dismissed on the grounds of *res judicata* in light of the New Jersey court's actions.[5]

Two issues are therefore presented in this proceeding: (1) the propriety of Judge Barlow's dismissal of the federal action on *Younger* grounds, and (2) the *res judicata* effect on the federal action of the subsequent state court determination.

B. Younger Abstention

1. *The Realm of Younger*

Judge Barlow decided this case shortly after the Supreme Court handed down *Juidice* v. *Vail*.[6] Based on the holding in *Juidice* that *Younger* forbade an injunction against state contempt proceedings, even though such proceedings arose out of a dispute between private parties, Judge Barlow concluded that "because the plaintiffs have at least some prospect of vindicating their constitutional rights in the state court, this Court will not intervene in the controversy."[7]

Such a declaration would represent a significant extension of the *Younger* doctrine. The heart of *Younger* lay

[5] Although New Jersey's motion to dismiss is phrased in terms of a claim of "mootness," discussion of the contention revolves around the assertion that the New Jersey judgments preclude federal litigation.

[6] 430 U.S. 705 (1972).

[7] Aa 38.

in the area of a pending criminal prosecution. The "traditional reluctance" of courts of equity to enjoin on-going criminal proceedings[8] combined with the somewhat distinct interest of comity, that federal courts not interfere unnecessarily with a state's attempts to enforce its criminal law in its own courts.[9] The result was a bar to federal interference in on-going state prosecutions, absent extraordinary circumstances. In contrast, the requested relief in the present controversy would affect a wholly civil proceeding brought by a private litigant. This distinction in our view takes the case before us outside the ambit of *Younger*.[10]

Juidice is the only case in which the Supreme Court has accorded *Younger* deference to a private action in a state court. It is, moreover, one of only three cases in which *Younger* has been applied by the Supreme Court

[8] *Huffman* v. *Pursue Ltd.*, 420 U.S. 592, 604 (1975).

[9] "Comity" has been defined as the interest in assuring "proper respect for state functions." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). The definition is less than clear cut, but the scope of this interest has not been accurately delineated by subsequent cases.

[10] *See e.g. Bonnet* v. *Trustees of Schools of Twp. 41*, 563 F.2d 831, 834 (7th Cir. 1977) (in diversity action regarding title, *Younger* does not mandate abstention in favor of parallel state proceedings): *Marshall* v. *Chase Manhattan Bank*, 558 F.2d 680, 683-84 (2d Cir. 1977) (*Younger* does not require abstention in favor of previously commenced state "winding up" proceeding for a corporation).

outside the domain of criminal proceedings.[11] And the facts of *Juidice* may well make it *sui generis*.

Federal tribunals, the Court in *Juidice* decided, could not enjoin a state court's enforcement of a contempt citation. The contempt power used by the state courts to assure respect for their workings lies, as the Court in *Juidice* specifically noted, "at the core of the administration of a State's judicial system."[12] Direct interference with a state contempt citation, even though civil in nature, is close to the type of intervention into state criminal processes condemned in *Younger*; it invades the right of

---

[11] See *Huffman* v. *Pursue Ltd.*, 420 U.S. 592 (1975); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *cf. Mitchum* v. *Foster*, 407 U.S. 225, 243 (1972) (reserving question). The recent extensions of *Younger* have evoked a significant amount of unfavorable scholarly commentary suggesting that such extensions are unsupported by precedent and policy. *E.g.* L. Tribe, *American Constitutional Law*, 152-56 (1978); Fiss, *Dombrowski*, 86 Yale L.J. 1103 (1977); Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 Texas L. Rev. 1141 (1977); Weinberg, *The New Judicial Federalism*, 29 Stanford L. Rev. 2291 (1977); Note, *Post-Younger Excesses in the Doctrine of Equitable Restraint, A Critical Analysis*, 1976 Duke L. Rev. 523; *see e.g.* Zeigler, *An Accommodation of the Younger Doctrine and the Duty of Federal Courts to Enforce Constitutional Safeguards in State Criminal Processes*, 125 U. Pa. L. Rev. 266 (1977); *Developments in the Law, Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1327-1330 (1977). *See generally id.* at 1274-1327.

[12] 430 U.S. 327, 335; *cf. Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).

the state to vindicate its authority in its own courts.[13] To bar such an incursion carries few implications for the broad range of civil proceedings, a fact which the five-man majority in *Juidice* explicitly recognized.[14]

Similarly, in *Trainor* v. *Hernandez*,[15] which held *Younger* applicable to an action taken by a state "in its sovereign capacity" to recoup fraudulently obtained welfare benefits, Justice White, for a five-man majority, pretermitted the applicability of "*Younger* principles to all civil litigation."[16] Justice Blackmun, the fifth subscriber to the majority's position in *Trainor*, wrote a separate concurrence. In it, he reaffirmed the language of Justice Black's original formulation in *Younger*, asserting that "the concept does not mean blind deference to states' rights" but only the avoidance of "undue interference with the legitimate activities of the states."[17] Pursuing

---

[13] *Cf. Gipson* v. *New Jersey Supreme Court*, 558 F.2d 701, 703-04 (3d Cir. 1977) ("In view of the special relationship between state courts and members of their bars, we hold that the doctrine of federal non-interference is appropriate in suits concerning pending state attorney disciplinary proceedings."). *But cf. Morial* v. *Judiciary Committee*, 565 F.2d 295, 298-99 (5th Cir. 1977) (*en banc*) (*Younger* does not bar review of requirement that state judges leave the bench before running for office).

[14] 430 U.S., at 336 n.13 ("we save for another day 'the applicability of *Younger* to all civil litigation'"). *But cf. id.*, at 345 n.*, (Brennan, J. dissenting) (suggesting that reservation of the applicability of *Younger* to all civil litigation is "tongue in cheek").

[15] 431 U.S. 434 (1977).

[16] *Id.* at 444-445 n.8.

[17] *Id.* at 448.

what he described as the "requirement of balancing state and federal interests," [18] Justice Blackmun noted that except for *Huffman* and *Juidice, Younger* had previously been limited to criminal proceedings. These situations in *Huffman* and *Juidice,* he declared, were of special interest to the state.[19]

Regarding the proceeding before him, Blackmun wrote:[20]

> I, too, find significant the fact that the state was a party in its sovereign capacity to both state and federal suit. *Ante* at 444. Here I emphasize the importance of the fact that the state's interest in the pending proceedings was substantial. In my view, the fact that the state had the option of proceeding either civilly or criminally to impose sanctions . . . demonstrates that the underlying state interest is of the same order of importance as the interest in *Younger* and *Huffman.* The propriety of abstention should not depend on the state's choice to vindicate its interest by a less drastic, or perhaps more lenient alternative.

Undertaking the type of balancing employed by Justice Blackmun, who cast the deciding vote for reversal in both *Juidice* and *Trainor,* it seems to us that the policies weighing in favor of *Younger* abstention have been significantly diluted in this case. Unlike *Trainor* and

[18] *Id.* at 448.

[19] *Id.* at 448-449.

[20] 431 U.S. at 449-50.

Huffman, the statute at issue here is unrelated to the enforcement of the state's criminal laws; indeed, citizens rather than the government initiated action in the New Jersey state court. Neither the traditional equitable aversion toward intermeddling in criminal processes, nor the state's interest in enforcing its laws in its own forum is present.[21]

In further contrast to *Juidice,* the adjudication of the constitutionality of administrative regulations is not a "core" function of the state judiciary.[22] Federal equitable action addressed to administrative regulations would not endanger the smooth functioning of the state judicial system. Moreover, the relief sought includes a declaration of rights and an injunction against state administrative agencies, rather than an injunction against state court action, a procedure which the plaintiff offered to withdraw.

Thus, the result reached by Judge Barlow is not compelled by the holdings of the previous cases in the *Younger* line. And, as explicated below, other principles counsel against such an extension.

[21] The appellee's brief suggests that the importance of the state's role in providing education, cited in *Brown* v. *Bd. of Education,* 347 U.S. 483, 493 (1954), furnishes justification for invoking the *Younger* bar. Such an argument uses the words of *Brown* to mock its substance. *Brown's* holding sanctioned extensive judicial intervention in educational affairs to vindicate federal rights. We do not understand *Younger* and its progeny to have cast any aspersions on the viability of *Brown.*

[22] *Cf. Juidice* v. *Vail,* 430 U.S. 327, 335 (1977).

Appendix A

2. *Countervailing Considerations; The Values of Federal Jurisdiction*

Judge Barlow's opinion suggests that *Younger* bars federal intervention whenever a remedy might be available in a state criminal or civil action. But such an exhaustion doctrine has been explicitly rejected by the Supreme Court in the context of § 1983 proceedings. In *Monroe* v. *Pape*,[23] the Court held that:

> It is no answer [to a suit under § 1983] that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked.

The rule of *Monroe*, we believe, has not been debilitated by the development of *Younger*.[24]

---

[23] 365 U.S. 167, 183 (1961).

[24] *See Zablocki* v. *Redhail*, 46 U.S.L.W. 4093, 4095 n.5 (1978) (father need not petition court for exemption to marriage requirement or raise constitutional objection in state court before challenging it in federal court). *Moore* v. *City of East Cleveland*, 431 U.S. 494, 497 n.5 (1977) (exhaustion of zoning variance proceeding not necessary in challenge to constitutionality of ordinance); *Ellis* v. *Dyson*, 421 U.S. 426, 432 (1975) ("Exhaustion of state judicial or administrative remedies was unnecessary, for we have long held that an action under § 1983 is free of that requirement"); *Leonard* v. *City of Columbus*, 551 F.2d 974, 978 *aff'd en banc* 565 F.2d 957 (5th Cir. 1977) (exhaustion of administrative and judicial remedies not necessary to challenge police firing); *Morial* v. *Judiciary Commission*, 565 F.2d 295 (5th Cir. 1977) (*en banc*) (*Younger* inapplicable where no enforcement proceeding is in progress. *But cf. Ingraham* v. *Wright*, 430 U.S. 651 (1977) (availability of state criminal and tort sanctions held to satisfy "due process" required for corporal punishment in schools).

(Footnote continued on following page)

Appendix A

But even if Judge Barlow's interpretation of *Younger* were limited to erecting a rampart against federal adjudication whenever a state case is pending, it would be at odds with a basic premise of our federal judicial system. It is fundamental that where Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action. As Justice Rehnquist noted this term:

> The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court. . . . We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline* v. *Burke Construction Co.*, 260 U.S. 226 (1922):
>
> > [A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect

---

(Footnote continued from preceding page)

We have recently surveyed the plethora of decisions rejecting an exhaustion requirement for § 1983. *U.S. ex rel. Ricketts* v. *Lightcap*, 567 F.2d 1226, 1229-31 (3d Cir. 1977); *see Hochman* v. *Bd. of Educ.*, 534 F.2d 1094, 1096-97 (3d Cir. 1976).

The implication in *Huffman* v. *Pursue Ltd.*, that *Younger* mandated exhaustion of state remedies was explained by *Wooley* v. *Maynard*, 430 U.S. 705, 711 (1977), as applying only when an attempt is made to "annul the results of a state trial."

> of that judgment is to be determined by the application of the principles of *res adjudicata.* . . ." [25]

According to Justice Black's seminal opinion, the *Younger* doctrine finds its roots in the "slogan, 'Our Federalism,' born in the early struggling days of our Union of States." [26] Since the traditional right of the plaintiff to proceed simultaneously in state and federal forums has

---

[25] *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (Plurality opinion, per Rehnquist, J.) *Vendo Co.* involved the issue of whether a federal court was "expressly authorized" by the federal antitrust laws to issue an injunction against pending state proceedings. In evaluating the question of whether such an injunction was necessary "in aid of" federal jurisdiction, Justice Rehnquist reaffirmed the general right of a litigant to proceed simultaneously in state and federal tribunals. *See Stanton* v. *Embry*, 95 U.S. 548, 554 (1876) (rejecting contention that pendency of prior state court suit bars federal action); *Donovan* v. *City of Dallas*, 377 U.S. 409, 412 (1963) (suit filed in federal court to relitigate same issues, state court enjoined plaintiffs, holding injunction invalid. "Plaintiffs in the second suit chose to file that case in federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not plea of *res judicata* in the second suit would be good is a question for the federal court to decide"). Hart & Wechsler, Federal Courts and the Federal System 1234-35 (2d ed. 1973).

Brillhart v. *Excess Insurance Co.*, 316 U.S. 491 (1942) is not to the contrary, at least in the circumstances of this case. There, where an issue was pending in a state court proceeding, the dismissal of a declaratory judgment was remanded to the district court to consider whether "the controversy between the parties can be better settled in the proceeding in the state court." This disposition, however, was premised on the fact that the "issues were not governed by federal law."

[26] 401 U.S. at 44-45.

an equally long lineage it would seem to follow that the plaintiffs' right is not alien to the counsels of *Younger,* and therefore that abstention was improper in this case.[27]

Finally, we note that the more broadly the *Younger* doctrine is pressed, the more it encroaches upon explicit congressional grants of equitable jurisdiction. The extreme of the extension would be an assertion that *Younger* precludes federal injunctions whenever any state proceeding is pending. Such an approach would seem clearly inappropriate. Since 1793 Congress has specifically prohibited by statute—now codified as 28 U.S.C. § 2283—the

---

[27] The venerable case of *McClellan* v. *Carland*, 217 U.S. 268 (1910), which we have recently cited as controlling, *Cotler* v. *Inter-County Orthopedic Assn.*, 526 F.2d 537 (3d Cir. 1975), would seem to dispose of the contention that established canons of comity bar declaratory judgment in the action before us. In *McClellan*, the plaintiffs, who claimed to be heirs at law, and who had previously been denied letters of administration in an on-going state probate proceeding, brought suit in federal court to have themselves declared the owners of an estate which had passed intestate. At the application of the state, the federal court granted a stay to allow the state attorney general to bring an action in state court to assert the state's claims. The Supreme Court reversed. Despite the pendency of the probate proceeding and the expressed state interest, the *McClellan* Court said (217 U.S. at 281):

> It appeared upon the record that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance and turned the matter over for adjudication to a state court. This, it has been steadily held, a federal court may not do. *Chicot County* v. *Sherwood*, 148 U.S. 529, 534.

Cf. Town of Lockport v. *Citizens for Community Action*, 430 U.S. 529, 564 (1977) (subsequently filed state civil suit does not invoke *Younger* abstention).

issuance of federal injunctions to stay state court actions except in limited circumstances.[28] If the principles of federalism and comity bar issuance of such injunctions in all civil cases, § 2283 would be superfluous. Moreover, such an expansion of *Younger* would be repugnant to those federal statutes which "expressly authorize" injunctions to stay proceedings in a state court.[29]

A more moderate extension would still generate tension with Congressional policies. And while such discord may not alone preclude expansion of *Younger*'s injunctive bar, frustration of Congressional policy weighs heavily against it.

---

[28] The originally unqualified prohibition contained in the Act of March 2, 1893, Ch. 22 § 55, 1 Stat. 334, was subjected over the years to a number of judicially and legislatively created exceptions. *See generally* Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. Chi. L. Rev. 717, 719-738 (1977).

[29] In 1874, the anti-injunction statute was amended to provide an exception where an injunction was authorized by any law relating to bankruptcy proceedings. Revised Statutes of 1874, Ch. 12 § 720, 18 Stat. 134. A 1948 revision, currently enshrined in 28 U.S.C. § 2283 (1970), extended the exception to injunctions "expressly authorized" by any Act of Congress revision. *See Mitchum* v. *Foster,* 407 U.S. 225, 233-38 (1972). *Cf. Vendo Co.* v. *Lektro Vend,* 433 U.S. 623, 639 n.9 (1977) (Rehnquist, J. for a plurality) ("If Congress determines that the use of state court proceedings to foster anticompetitive schemes is of sufficient gravity, it may simply conclude that the need for greater antitrust enforcement outweighs the need to prevent friction in our federal system and could amend § 16 to expressly authorize an injunction of such state court proceedings.").

An expansion to all civil proceedings would, also, overrule precedents that granted such injunctions in a number of situations. *See, e.g., Leiter Minerals* v. *United States,* 352 U.S. 220 (1957); *NLRB* v. *Nash Finch Co.,* 404 U.S. 138 (1971); *Capital Service Inc.* v. *NLRB,* 347 U.S. 501 (1954).

Here, the appellants claimed a violation of their constitutional rights under 42 U.S.C. § 1983, and invoked federal jurisdiction under 28 U.S.C. § 1343(3). In *Mitchum* v. *Foster,*[30] without dissent, the Supreme Court held that § 1983 is an expressly authorized exception to the general statutory bar to injunctions against state court proceedings. And in *Vendo Co.* v. *Lektro Vend,*[31] all of the members of the Court accepted *Mitchum* as an authoritative exposition of the law regarding § 1983. The plurality, per Justice Rehnquist, restated the holding in *Mitchum*:[32]

> We recounted in detail that statute's history which made it abundantly clear that by its enactment Congress had demonstrated its direct and explicit concern to make the federal courts available to protect civil rights against unconstitutional actions of state courts. We summarized our conclusion in these words:
>
> > This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the states and the nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might in fact be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. *Mitchum,* 407 U.S. at 242.

---

[30] 407 U.S. 225 (1972).

[31] 433 U.S. 623 (1977).

[32] *Id.* at 633.

In light of the policy embodied in § 1983 and reiterated in *Vendo,* we are most reluctant to stretch the equitable doctrine of *Younger* beyond its prior boundaries to encompass a situation in which the only pending proceeding is a civil action filed by a federal plaintiff in a state court. As the Supreme Court stated in *England* v. *Board of Medical Examiners,*[33] "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a federal district court to consider federal constitutional claims can be compelled without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

3. *The Balance*

Younger and its offspring "express equitable principles of comity and federalism."[34] The application of these principles, in turn, requires "sensitivity to the legitimate interests of both state and national governments"[35] as well as consideration for the rights of litigants. In this case, we review a decision advancing the *Younger* doctrine well beyond the perimeter which it previously occupied. Such a salient, moreover, thrusts into an area in which both the traditions of our dual court system, and congressional efforts to protect constitutional rights favor the allowance of federal relief. Accordingly, we believe *Younger* is not controlling.

---

[33] 375 U.S. 411, 415 (1964).

[34] *Ohio Bur. of Employment Services* v. *Hodory,* 431 U.S. 471, 479 (1977).

[35] *Id.*

Our conclusion is strengthened by the sole Supreme Court case which we have found to be directly on point. In *Sweet Briar Institute* v. *Button,*[36] a college brought suit in federal court to enjoin state officials from enforcing a racially restrictive covenant contained in a bequest to the college. In view of the fact that the college's constitutional challenges had been rejected in a pending action in state court, the federal tribunal stated that policies of comity and *res judicata* precluded its entertaining the suit. Although the district court asserted that dismissal was warranted, it deferred such action to await the final resolution of the state proceeding.

On appeal, the Supreme Court reversed in a brief per curiam opinion,[37] citing *England* and *Kline* and remanded for consideration on the merits.[38] Though decided before *Younger, Sweet Briar* is a substantive adjudication and it is procedurally identical with the case before us. It is thus persuasive support for the conclusion that the dismissal by the district court here was improper.

C. The Impact of the State Court Judgment

The determination that *Younger* did not bar adjudication by the district court, however, carries us only part of the distance toward resolving the issues of this case. If Judge Barlow improperly dismissed on *Younger* grounds—as we hold he did—we must deal with the question of the proper effect to be given to the state court ruling.

---

[36] 280 F. Supp. 312, *rev'd* 387 U.S. 423 (1967).

[37] 387 U.S. 423 (1967).

[38] Justices Harlan and Stewart dissented without opinion. *Id.*

Appendix A

1. *The Rule*

Younger, itself, erects a barrier against federal action in the face of a pending state prosecution. But *Younger*'s definition of "pending" prosecution has also manifested a proclivity to cast its shadow broadly. Language in *Huffman* v. *Pursue, Ltd.,*[39] where federal action was foreclosed by a state tribunal's ruling which the federal plaintiff declined to appeal, may be read to imply that the principles underlying *Younger* require a federal court to give broad preclusive effect to unappealed state court judgments. Such an intimation, however, is substantially weakened by later cases.

In *Ellis* v. *Dyson,*[40] the plaintiff had been convicted in a municipal court proceeding of the crime of loitering. Rather than appeal his conviction and commence a trial *de novo,* the plaintiff brought a declaratory judgment action in federal court challenging the statute under which he had been prosecuted. On appeal the Supreme Court declined to dismiss on *Younger* grounds.

More recently, in *Wooley* v. *Maynard,*[41] a plaintiff challenged a New Hampshire ordinance forbidding the defacing of the motto "live free or die" on license plates. Although he had three times pleaded not guilty on the ground that displaying the motto violated his religious convictions, the plaintiff had thrice been found guilty of

[39] 421 U.S. 599 (1975).

[40] 421 U.S. 426 (1975).

[41] 430 U.S. 705 (1977).

Appendix A

misdemeanors for covering the motto, and had declined to appeal his convictions. Rather, he brought an action for an injunction in federal court. The Supreme Court upheld the issuance of an injunction against further enforcement of the statute, commenting that the *Huffman* result arose out of the fact that the suit there attempted to enjoin the enforcement of a state court decree that ordered the plaintiff's thearter closed as a public nuisance. Thus, not only was *Younger* held to be inapposite, but an unappealed judgment resulting from a previous suit raising identical issues was apparently not given binding effect.[42]

Although *Huffman* is not controlling, the question here should still be resolved on the basis of principles which take into account the nature of our federal court system and the constitutional imperative which it protects. Rather than *Huffman,* the applicable precedent is *England* v. *Louisiana State Board of Medical Examiners.*[43] In *England,* the plaintiffs had been remitted under *Pullman* abstention to a Louisiana state court. After the plaintiffs' return to federal court following state litigation, the United States Supreme Court refused to grant preclusive effect on a federal constitutional issue to the judgment of the Louisiana Supreme Court. The United States Supreme Court stressed the importance of the "right to litigate claims fully in the federal courts," [44] and the potentially decisive importance of federal fact-finding.[45] To

[42] The Supreme Court did not, however, elaborate the doctrine which led it to ignore the state ruling.

[43] 375 U.S. 411 (1964).

[44] *Id.* at 417.

[45] *Id.* at 416.

deprive a litigant of a federal forum against his will, the Court declared, would "be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction. . . ." [46] Instead, it held, "the litigant is in no event to be denied his right to return to the district court unless it clearly appears that he voluntarily . . . [and] fully litigated his federal claims in state courts. [47]

England implies that the state court determination in this case should not govern the issues here unless the plaintiffs could be said to have waived their rights to litigate in federal court by fully and unreservedly litigating their claims in state court.

The preclusive effect of prior state court judgments on § 1983 suits has, however, evoked a spectrum of overlapping and inconsistent precedent and commentary.[48] One

---

[46] *Id.* at 415.

[47] It was suggested that a plaintiff remitted to state court could foreclose any implication of waiver by entering an explicit "reservation" on the state court record. Such an explicit reservation was not, however, to be the *sine qua non* of federal jurisdiction. 375 U.S. at 421.

[48] *See* Averitt, *Federal Section 1983 Actions After State Court Judgments,* 44 U. Colo. L. Rev. 191 (1974); McCormack, *Federalism and Section 1983: Limitation on Judicial Enforcement of Federal Claims,* Part II, 60 Va. L. Rev. 250 (1974); Soifer & Macgill, *supra,* note 11, at 1183-85 n.173; Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 N.W. L. Rev. 859 (1976); *Development in the Law, supra,* note 11, at 1330-1354; Note, *The Relationship of Federal and State Courts,* 88 Harv. L. Rev. 453 (1974).

(Footnote continued on following page)

relatively clear line of cases, looking to the principles of *res judicata* which govern the effect of prior judgments generally, holds that where "a federal constitutional claim is based on the same asserted wrong which was the subject of a [prior] state action, *res judicata* will bar the federal constitutional claim, whether asserted or not." [49]

(Footnote continued from preceding page)

The Fifth Circuit has taken a somewhat inconsistent position. *Compare Blunt* v. *Marion County Bd. of Educ.,* 515 F.2d 951 (5th Cir. 1975) (plaintiff allowed to raise federal claims not pressed in state court litigation previously); *Maher* v. *City of New Orleans,* 516 F.2d 1051, 1055-58 (5th Cir. 1975) (plaintiff allowed to challenge zoning ordinance as unconstitutional, despite his prior attempt to overturn it on state grounds in state court), with *Jennings* v. *Caddo Parish School Bd.,* 531 F.2d 1331 (5th Cir. 1976) *cert. denied,* —— U.S. —— (dictum) (prior state court judgment conclusive as to issues which might have been litigated); *Cornwell* v. *Ferguson,* 545 F.2d 1022 (5th Cir. 1977) (semble).

Similarly, in reviewing applicable precedents, the Sixth Circuit recently adopted the observation of one commentator that "the Supreme Court has given no guidance as to claim preclusion by final state court decision in § 1983 cases and . . . as a result, the decisions of the lower court teem with inconsistencies." *Getty* v. *Reed,* 547 F.2d 971, 975 (6th Cir. 1977). *See generally, Ellis* v. *Dyson,* 421 U.S. 426, 440-41 n.6 (1975) Powell, J. dissenting.

[49] *Red Fox* v. *Red Fox,* 564 F.2d 361, 363 (9th Cir. 1977) *quoting Scoggin* v. *Schrunk,* 522 F.2d 436 (9th Cir. 1975) *cert. denied,* 423 U.S. 1066 (1976); *See Williams* v. *Washington,* 554 F.2d 369 (9th Cir. 1977); *Spence* v. *Latting,* 512 F.2d 93 (10th Cir. 1974) *cert. denied* 423 U.S. 896 (1976); *Lovely* v. *Laliberte,* 498 F.2d 1261 (1st Cir. 1974); *Francisco Enterprises* v. *Kirby,* 482 F.2d 481 (9th Cir. 1973) *cert. denied,* 415 U.S. 916 (1974); *Cf. Roy* v. *Jones,* 484 F.2d 96, 98 (3d Cir. 1973) (dictum).

Such an interpretation is not compelled by the terms of the *England* decision. Indeed, *England's* broad discussion of the right to a federal forum and the necessity of "unreserved litigation" to waive that right would seem to point to an equally broad right to reserve federal constitutional claims.[50] And while a policy of discouraging vexatious litigation and conserving judicial resources can apply to the interaction between state and federal decisions as well as to the binding effect of a judgment rendered by the same judicial system, a restrictive concept to the right to a federal forum has significant disadvantages. To hold that state court litigation bars a federal forum from deciding any claims which might have been raised before the state court would turn the state court into quicksand. It would not only serve as a trap for unwary plaintiffs who desire a federal tribunal, but encourage competently represented litigants to forego any venture

---

[50] *Cf. Atlantic Coast Line R. Co* . v. *Engineers,* 398 U.S. 281, 295 (1970). ("Although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone . . . and simultaneously pursue claims in both courts."); *see also Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974) (In federal anti-discrimination effort, congressional policy is to allow individual to pursue rights independently under Title VII and other applicable state and federal statutes).

Unlike the court in *Francisco Enterprises Inc.* v. *Kirby,* 482 F.2d 481 (9th Cir. 1973), we do not read *Angel* v. *Bullington,* 330 U.S. 183 (1947) as establishing a general rule applicable to § 1983 proceedings precluding federal adjudication of issues which could have been raised in state court but were not. *Angel* involved a diversity action in which the same state law theories which had previously formed the basis for a state suit were brought before a federal district court. Moreover, the federal issues to which *res judicata* were held to apply had been asserted before the state court.

into state jurisdiction to exhaust state administrative and judicial procedure on pain of losing their right to a federal hearing. Such results are hardly salutary.[51]

In our view, at least where a federal suit is commenced before a final decision by the state court, the proper rule is that enunciated by the Second and Seventh Circuits: a state court judgment forecloses a § 1983 litigant from raising grievances in federal court only if such claims have been pressed before, and decided by, a state tribunal.[52]

---

[51] *See also Monroe* v. *Pape supra.* Nor, in light of our discussion above concerning the traditional right to bring parallel actions, are we persuaded by the position that the commencement of litigation in state court amounts to a waiver of the right to proceed in federal court on other issues. This is particularly true where, as here, the federal action began before the state action had proceeded significantly toward final judgment.

[52] *See Graves* v. *Olgiati,* 550 F.2d 1327, 1329 (2d Cir. 1977); *Mitchell* v. *NBC,* 553 F.2d 265, 269-71, 274-77 (2d Cir. 1977); *McCune* v. *Frank,* 521 F.2d 1152, 1154-57 (2d Cir. 1975); *Newman* v. *Board of Educ.,* 508 F.2d 277, 278 (2d Cir. 1975) *cert. denied,* 420 U.S. 1004; *Lombard* v. *Board of Educ.,* 502 F.2d 631, 635-37 (2d Cir. 1971) *cert. denied,* 420 U.S. 976 (1975); *Kurek* v. *Pleasure Driveway and Park Dist.,* 557 F.2d 580, 594-95 (7th Cir. 1977); *Reich* v. *City of Freeport,* 527 F.2d 666, 670-72 (7th Cir. 1975). *Cf. Blankner* v. *City of Chicago,* 504 F.2d 1037, 1041-42 (7th Cir. 1974) *cert. denied,* 421 U.S. 948 (*res judicata* held to bar suit where federal claims had been raised by *amicus curiae* before state court).

Insofar as our opinion in *Roy* v. *Jones,* 484 F.2d 96, 100-01 (1973), contains *dicta* to the contrary, it should be noted that such statements were isued in the context of an attempt to relitigate issues presented to a state court after the final judgment of the state supreme court. *Cf. Kaufman* v. *Moss,* 420 F.2d 1270 (3d Cir.) *cert. dcnied,* 440 U.S. 846 (1970) (prior criminal judgment is *res judicata* only on issues tendered to the jury).

(Footnote continued on following page)

Such a rule avoids the tendency of the "could-have-litigated" test to discourage the use of state forums to determine matters of state law, while at the same time giving due regard to matters actually decided by the state tribunals. Further, it responds to the particular concern for assuring the right to a federal forum in which to assert constitutional claims. And finally, it captures the substance of the Supreme Court's holding that:

> If a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there *and has them decided there* . . . he has elected to forego his right to return to the District Court.[53]

(Footnote continued from preceding page)

We note that the determination of which issues or claims were brought before the state court may on occasion necessitate subtle inquiries. In such cases, the principles of *England* would bid us focus attention on the intent of the party raising claims in state court. We do not explore the potential distinctions in such cases, however, because they are not necessary to our decision here.

[53] 419 *Cf. Sweet Briar Institute* v. *Button*, 387 U.S. 423 (1967) (prior state court dismissal not *res judicata*); *McClellan* v. *Carland*, 217 U.S. 268 (1910) (prior probate proceeding not *res judicata*).

We note also that, to the extent that the prior New Jersey opinion governs this case, its holding is made applicable by the force of 28 U.S.C. § 1738. § 1738 enjoins a federal court to give the "same full faith and credit" to state court judgments "as they have by law or usage in the courts of such state." *See Mitchell* v. *N.B.C.*, 553 F.2d 265 (2d Cir. 1977); Note, *Relationship supra* note 47. *But see Scoggin* v. *Schrunk*, 522 F.2d 436, 437 n.2 (9th Cir. 1975) *cert. denied*, 423 U.S. 1066 (1976) ("It has not been contended that the question is one upon which federal courts must look to state law.").

(Footnote continued on following page)

2. *The Application*

The question with regard to the New Jersey judgment thus is whether the plaintiffs in this case "freely and without reservation" litigated their grievances in state court. We conclude that such litigation could be said to have occurred only with respect to a portion of their claims.

As noted above, the filing of a federal declaratory and injunctive action here occurred before any determination by the state court other than denial of preliminary relief without prejudice. In addition, the plaintiffs offered to dismiss the state court action. But this offer was rejected, and the plaintiffs were remitted to their state court suit on twin *Younger/Pullman* grounds. The situation is therefore analogous to the *England* paradigm, in that the federal action, when filed, impinged upon no final state judg-

---

(Footnote continued from preceding page)

In any event, the *res judicata* effect would seem to be no broader than that available in state court. If federal forums refused to hear claims not barred in state courts, the purpose of repose would not be served by the federal doctrine, since the litigants could return to the state court to pursue their claims.

The general rule in New Jersey is that subsequent suits on the same cause of action are barred by *res judicata*, and a new theory of the case does not remove such bar. However, from our research it is not at all clear that New Jersey courts would consider a § 1983 suit to constitute the "same cause of action" as a suit in Superior Court to review the administrative promulgation of a regulation. *See e.g., Brick Twp.* v. *Vannell*, 151 A.2d 404 (N.J. Super. 1959) (suit for possession of land, involving same parties and same issues was not same cause of action as prior declaratory judgment action). There is thus considerable doubt in this case whether New Jersey courts would deem a prior judgment an adjudication of claims which could have been, but were not raised.

ments. Accordingly, insofar as plaintiffs did not "fully litigate" the issues in state court, they should be permitted to return to the federal forum.

There is no evidence that the contentions regarding *ex post facto* violations, unconstitutional impairment of the obligation of contracts and uncompensated taking of private property were pressed in the state proceedings. Indeed, this is admitted by the defendants in their brief in support of their motion to dismiss.[54] With respect to these claims, the rule we adopt mandates federal consideration on the merits.

Plaintiffs' due process and equal protection challenges present a more difficult problem. In their brief before the New Jersey Superior Court, the plaintiffs pressed these contentions in terms quite similar to those asserted before us.[55] The New Jersey Court apparently resolved these issues against the plaintiffs on the merits.[56]

---

[54] Defendants' brief in support of motion to dismiss p. 4; *see* District Court opinion at Aa36 and Aa38, n.4.

[55] Compare plaintiffs' brief in this New Jersey Superior Court with appellants' brief here. Pp. 10-27.

[56] The Superior Court explicitly rejected the contention that the challenged action denied due process through the medium of an illegal "irrebuttable presumption." It also held that the regulations were "reasonable" rather than arbitrary and capricious, and "reasonably related to the felt public need." In light of the Superior Court's citation of *New Jersey Chapt. Am. Inst. of Planners* v. *New Jersey State Bd. of Prof. Planners,* 48 N.J. 581 (1967), an equal protection case, this appears to be a rejection of the equal protection challenge.

The conditions for an *England* waiver consequently may well be met on these points, and a federal court may be barred from allowing relitigation of the equal protection and due process challenges.[57] However, *res judicata* is an affirmative defense, dependent here on the factual issue of what submissions were actually made to the state court. Since we do not have before us a full record, it is appropriate to remand the case to the district court to allow such factual issue to be litigated there in the first instance.

---

[57] That the plaintiffs offered to dismiss the state suit does not weaken such conclusion. This is so inasmuch as the offer fell short of the explicit or implicit reservation required by *England,* for after the offer was rejected, plaintiffs fully litigated the equal protection and due process questions without informing the state court of any hesitancy, equivocation or reservation.

We are not unsympathetic to the plaintiffs' argument that their litigation in state court was ineffective to waive their right to a federal forum on the ground that it was undertaken in response to an improper ruling that the federal forum was unavailable. *Cf. England supra,* 375 U.S. at 422 (refusing to bind plaintiffs to a state court judgment where submission of claims to state court resulted from unclear federal precedent). Nonetheless, the plaintiffs had before them the fully articulated directions of *England.* Consequently, they could have explicitly reserved their federal claims before the state forum as they pursued their appeal in the federal courts. Instead, they chose to pursue the state court route in hopes of success on their constitutional claims before that tribunal. As a matter of litigation strategy this is understandable, for they did not know whether the present appeal would succeed. But it would seem unfair to the state, in the context here, to permit the plaintiffs now to retrace their steps.

Appendix A

D. Conclusion

The district court erred in abstaining on *Younger* grounds. However, the explicit holdings of the New Jersey courts on plaintiffs' due process and equal protection challenges may be *res judicata,* and the dismissal of these claims will be reversed and remanded for the purpose of ascertaining whether such contentions were fully and freely litigated in the state courts. Plaintiffs' remaining claims will be remanded to the district court for proceedings on the merits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Opinion Amplifying Oral Opinion of the United States District Court for the District of New Jersey

United States District Court
District of New Jersey

Chambers of
George H. Barlow
Judge

Trenton, New Jersey 08605
Federal Building

April 22nd, 1977

Not for Publication

William S. Greenberg, Esquire
Messrs. Greenberg & Mellk
28 West State Street
Trenton, New Jersey 08608
(Attorneys for Plaintiffs)

Mark Schorr, Esquire
Deputy Attorney General
State of New Jersey
Division of Law
Education and Public Employment Section
State House Annex
Trenton, New Jersey 08625
(Attorney for Defendants)

Re: New Jersey Education Association, Paterson Education Association, Camden Education Association, Education Association of Passaic, Newark Teachers

Appendix B

ASSOCIATION, WEST NEW YORK EDUCATION ASSOCIATION, UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI and MANNY DEPARA v. FRED G. BURKE, Commissioner of Education, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION. (Civil Action No. 76-2230.)

Gentlemen:

The doctrine of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), holds that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. Abstention is regularly ordered where there is an action pending in state court which will likely resolve the state-law questions underlying the federal claim. *See Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 83 (1975). *See also Carey* v. *Sugar*, 425 U.S. 73 (1976).

In this case, the plaintiffs have advanced several substantive constitutional claims. However, the state administrative rules and regulations are currently being challenged in the state courts by these same plaintiffs on a number of grounds, both state and federal. A decision in favor of the plaintiffs by the state courts would obviate the need for this Court to rule on the plaintiffs' constitutional claims. Thus, it appears that this is an appropriate case for the abstention doctrine.

Ordinarily, the federal court will retain jurisdiction over the action until the state courts have had an opportunity to make their ruling. In this case, however, there is a pending state judicial proceeding available for raising the constitutional issues presented to this Court. In fact, some of the constiutional issues have already been raised in the state court. In such circumstances—that is, where it is abundantly clear that the plaintiffs have the opportunity to present their federal claims in an ongoing state proceeding—we think it is appropriate to invoke the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), which calls for dismissal of the action. *See Juidice* v. *Vail*, 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977); *cf. New Jersey* v. *Chesimard*, No. 77-1104 (3d Cir., filed Mar. 9, 1977) (en banc).

Appendix B

Juidice held that the principles of *Younger* are not confined solely to criminal or quasi-criminal cases. Instead,

> the "more vital consideration" behind the *Younger* doctrine of nonintervention lay not in the fact that the state criminal process was involved, but rather in
>
> > "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in the separate ways."

45 U.S.L.W. at 4271 (citations omitted).

It was made clear at the oral argument of this motion that what the plaintiffs are really seeking in this Court is an injunction against the enforcement of the state reg-

ulations in question pending a decision—by this Court or by the state court—on their validity.[1] However, that specific relief has already been denied by the state court.[2] Thus, in effect, the plaintiffs are asking this Court to reverse a determination of the state court. It is hard to imagine a situation more clearly calling for invocation of the principles of equity, comity, and federalism.[3]

The hallmark of the *Younger* doctrine has always been non-interference with state judicial functions. *See, e.g., The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 244 (1976). *Younger*'s constraints on federal injunctive relief were prompted by a concern for the integrity of state judicial proceedings. *See id.* at 245. Except in extraordinary cases, federal courts should give state courts the opportunity to fulfill their proper role. The award of injunctive relief in this case would impair the performance of a proper state function and would result in the duplication of legal proceedings.

The plaintiffs argue that abstention is inappropriate here because the "quality of review" and the types of remedies available in the state court are inadequate. Specifically, the plaintiffs complaint that the state court does not have before it a hearing record or a record of factual findings. They point out that the state court record is rather limited, pursuant to N.J. Ct. R. 2:5-4(b). They stress that damages and attorney's fees cannot be awarded in the current state action. They seem to contend that

[1] *See* Transcript, Apr. 4, 1977, at 15.

[2] *See* Transcript, Apr. 4, 1977, at 10-15.

[3] *See also Rooker* v. *Fidelity Trust Co.,* 263 U.S. 403 (1923).

abstention may not be ordered unless the remedies and the scope of review available in the state court are at least as broad as those available in the federal district court.

However, there is no such rule with respect to abstention. For example, the New York contempt procedures under consideration in *Juidice* clearly provided more limited possibilities for raising federal issues than the plenary procedures available in the federal district court. Nevertheless, the Supreme Court ordered the lower court to abstain, holding that "[n]o more is required to invoke *Younger* abstention" than "an opportunity to fairly pursue . . . constitutional claims in the ongoing state proceedings." 45 U.S.L.W. at 4272. There has been no showing in this Court that the ongoing proceeding in the New Jersey Appellate Division presents an inadequate opportunity for the litigation of the plaintiffs' constitutional claims.[4] Even the fact that the current state court record is somewhat limited is not an insuperable difficulty, in the light of N.J. Ct. R. 2:5-5(b). Because the plaintiffs have at least some prospect of vindicating their constitutional rights in the state court, this Court will not intervene in the controversy.

At the oral argument of this motion, the plaintiffs offered to withdraw their state court action with prejudice,[5]

[4] The plaintiffs point out that many of their constitutional claims are not before the state court, and they argue that this fact makes the state court action inadequate. It is not clear why the plaintiffs have not submitted all of their federal claims to the state court. There is nothing on the record to indicate that the state procedures prevented them from doing so. Thus, it appears that they had the opportunity to present all of their constitutional claims. Their failure to avail themselves of this opportunity does not mean that the state procedures are inadequate. *See Juidice* v. *Vail, supra,* 45 U.S. L.W. at 4272.

[5] *See* Transcript, Apr. 4, 1977, at 14.

apparently in the belief that the chief obstacle to this Court's exercise of jurisdiction is the pendency of the state proceedings. There are a number of problems with this procedure. First, although the pendency of state proceedings is an essential predicate to *Younger* abstention, it is not necessary for *Pullman* abstention. *Compare* C. Wright, *The Law of Federal Court* § 52A, at 233 (3d ed. 1976), *with id.* § 52, at 220-21. Because we have already determined that this is an appropriate case for *Pullman* abstention, the dismissal of the plaintiffs' state court case would not result in our reaching the merits of their constitutional claims—we would continue to abstain until the unsettled questions of state law were resolved by the state courts. Second, it is likely that a withdrawal of the state court suit with prejudice would constitute *res judicata* and would bar the plaintiffs from litigating the same issues in this Court. *See Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973); *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974); *Gambocz* v. *Yelencsics,* 468 F.2d 837, 840 (3d Cir. 1972); *Bennun* v. *Board of Governors of Rutgers,* 413 F. Supp. 1274, 1278 (D.N.J. 1976); C. Wright, *supra,* § 52, at 221.

For the reasons expressed above, the defendants' motion to dismiss will be granted.

Very truly yours,

GEORGE H. BARLOW
United States District Judge

GHB/ebj

APPENDIX C

Order of the Superior Court of New Jersey, Appellate Division

(Filed—October 15, 1976)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

JOSE YI, MANNY DI PARA, Individually and as representatives of class comprised of all Bi-Lingual/Bi-Cultural & English as a second language, Teachers of the State of New Jersey,

Plaintiff,

vs.

FRED G. BURKE, Commissioner of Education and The Board of Education of the State of New Jersey,

Defendant.

This matter having been opened before the Honorable John F. Crane, J.A.D., assigned to emergent applications by Michael D'Alessio, Jr., Attorney for Plaintiffs and upon telephone notice to the Attorney General of New Jersey, Susan Gifis responding and the matter having been presented on Wednesday, October 13th, 1976 pursuant to RR 2:9-8.

Appendix C

It is on this 13th Day of October 1976 ORDERED that Motion for Emergency Ad Interim Stay of Enforcement of Defendant's regulations amending N.J.A.C. 6:11-8.8 & 8.9 is hereby denied without prejudice.

JOHN F. CRANE, J.A.D.

Dated: Oct. 15, 1976

APPENDIX D

Order of the Superior Court of New Jersey, Appellate Division

(Filed—November 18, 1976)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-540-76

MOTION NO. M-398-76

BEFORE PART C

JOSE YI, MANNY DEPARA, etc.,

vs.

FRED G. BURKE, COMMISSIONER OF EDUCATION, *et al.*

JUDGES: FRITZ
CRAHAY
ARD

Moving Papers Filed—October 13, 1976

Answering Papers Filed—November 1, 1976

Date Submitted to Court—November 12, 1976

Date Decided—November 17, 1976

This matter having been duly presented to the Court, it is hereby ordered as follows:

Appendix D

Motion/Petition for Interim Relief and Stay of Decision Pending Appeal Denied—Other

SUPPLEMENTAL:

The motion is denied without prejudice to its resubmission in conformity with R. 2:8-1.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

ELIZABETH MCLAUGHLIN
Clerk

For the Court:

JOHN W. FRITZ
P.J.A.D.

Witness, the Honorable John W. Fritz, Presiding Judge of Part C, Superior Court of New Jersey, Appellate Division, this 17th day of November 1976.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

APPENDIX E

Order of the Superior Court of New Jersey, Appellate Division

(Filed—April 26, 1977)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-540-76

MOTION NO. M-2189-76

BEFORE PART C

JOSE YI, MANNY DEPARA, etc.,

vs.

FRED G. BURKE, Commissioner of Education, etc.,

JUDGES: FRITZ
ARD
PRESSLER

Moving Papers Filed April 14, 1977
Answering Papers Filed April 20, 1977
Date Submitted to Court April 15, 1977
Date Decided April 25, 1977

Appendix E

This matter having been duly presented to the Court, it is hereby ordered as follows:

Motion for ad interim relief pending outcome of appeal
Granted—Denied—Other

SUPPLEMENTAL:

The application for a stay is denied with respect to any alleged member of the class of appellants who, by virtue of proficiency in English, is eligible for certification. The application for a stay is granted, however, in respect of those alleged members of the class who are without proficiency in English and, therefore, not certifiable pursuant to the challenged regulation. The stay as to these members of the class is, however, granted subject to the specific condition that no period of employment of any of them following the originally scheduled enforcement date of the regulation here challenged shall affect the tenure status of such members of the class as said status existed when the regulation was adopted in the event that the validity of the regulation is confirmed on appeal. Argument of the appeal is accelerated and will be heard at 10 a.m., June 6, 1977, before Part C of the Appellate Division, at Room 438, State House Annex, Trenton, New Jersey.

For the Court:

JOHN W. FRITZ
P.J.A.D.

Witness, the Honorable John W. Fritz, Presiding Judge of Part C, Superior Court of New Jersey, Appellate Division, this 25th day of April 1977.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

APPENDIX F

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed—July 12, 1977)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
A-540-76

JOSE YI, MANNY DEPARA, Individually and as representatives of class comprised of all Bi-Lingual-Bi-Cultural and English as a second language, Teachers of the State of New Jersey,

Appellants,

and

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Appellant-Intervenor,

v.

FRED G. BURKE, COMMISSIONER OF EDUCATION, and THE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents,

and

PUERTO RICAN CONGRESS OF NEW JERSEY,

Respondent-Intervenor.

Appendix F

Argued June 6, 1977—Decided Jul 12 1977

Before Judges Fritz, Ard and Pressler.

On appeal from New Jersey State Board of Education.

Mr. William S. Greenberg argued the cause for appellants (Messrs. Greenberg & Mellk, attorneys; Mr. Arnold M. Mellk, on the brief).

Mr. Robert T. Pickett appeared for appellant-intervenor.

Mrs. Susan Gifis, Deputy Attorney General, argued the cause for respondents (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Mrs. Erminie L. Conley, Deputy Attorney General, of counsel).

Ms. Jacquelyn R. Rucker argued the cause for respondent-intervenor.

Ostensibly, from the notice of appeal, this appeal challenges

> 1. *Amendments* to N.J.A.C. 6:11-8.9 concerning the teaching of English as a second language said amendments having been adopted September 15, 1976.
>
> 2. *Amendments* to N.J.A.C. 6:11-8.9 [*sic;* probably -8.8] concerning Bi-Lingual/Bi-Cultural Education adopted September 15, 1976. [Emphasis added.]

Counsel's brief, however, challenges the regulations in their entirety and we have considered the matter as though the notice of appeal were amended to that effect.

Appendix F

Appellants argue:

> Point I—Enforcement of these regulations abridges the constitutional rights of all the teachers in this class.
>
> Point II—Because appellants relied upon pre-existing licensing requirements the State Department of Education is estopped from enforcing these rules and regulations.
>
> Point III—Defendants did not comply with the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*

We are entirely satisfied of the authority for state regulation in the areas involved, it being well settled that the state may regulate occupations, professions and businesses in the interest of the public welfare so long as the means adopted are not arbitrary and are reasonably related to the felt public need. *N.J. Chapt., Am. I.P.* v. *N.J. State Bd. of Prof. Planners*, 48 N.J. 581, 599-600 (1967), app. dism. 389 U.S. 8 (1967). We are persuaded of the prima facie need for and the reasonableness of the regulations, including the inherent classification and the purpose, without particular regard for the strong presumption of validity, *Cooper River Convalescent Center* v. *Dougherty,* 133 N.J. Super. 226, 232 (App. Div. 1975) or the heavy burden imposed on him who challenges such regulation to demonstrate that it is arbitrary or unreasonable, *Consolidation Coal Co., et al.* v. *Kandle, et al.,* 105 N.J. Super. 104, 118-119 (App. Div. 1969), aff'd o.b. 54 N.J. 11 (1969).

We also believe that application of an estoppel doctrine in this area (even were we to find reliance in the estoppel sense, which we do not; *Skulski* v. *Nolan,* 68 N.J. 179 (1975)

Appendix F

is clearly distinguishable) would be most inappropriate, since it would obviously seriously impair a significant governmental interest. *Slurzberg* v. *Bayonne,* 29 N.J. 106 (1959).

Nor do we find any defect in the procedure adopted in the promulgation of the regulations. Despite appellants' protestations to the contrary, adoption of these regulations did not constitute a license revocation proceeding. The chosen procedure (*cf. R.H. Macy & Co. Inc.* v. *Director, Div. of Taxation,* 77 N.J. Super. 155, 179-180 (App. Div. 1962), aff'd o.b. 41 N.J. 3 (1963)) was quasi-legislative and complaint with the requirements in such a rule-making case. N.J.S.A. 52:14B-4; *cf. Amer. Trial Lawyers Assoc.* v. *N.J. Supreme Ct.,* 126 N.J. Super. 577 (App. Div. 1974), opinion adopted *in toto* and aff'd 66 N.J. 258 (1974); *In re Matter of Public Hearings,* 142 N.J. Super. 136 (App. Div. 1976).

To the extent appellants are concerned with that which they describe as an "irrefutable presumption," disfavored in law (*Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973); but *cf. Potter* v. *New Jersey Supreme Court,* 403 F.Supp. 1036, 1039 (D.N.J. 1975) aff'd 546 F.2d 418 (3 Cir. 1976), we observe that the result in *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) would unquestionably have been different had Berger there had the opportunity for individual review provided here by N.J.A.C. 6:11-3.31. We leave the application of the regulations to any individual to the particular record established, both pursuant to N.J.A.C. 6:11-3.31 and otherwise, in such a case.

We sustain the validity of the regulations. The stay heretofore granted is dissolved.

A True Copy

ELIZABETH MCLAUGHLIN
Clerk

APPENDIX G

Order of the Supreme Court of New Jersey, Denying Petition for Certification

(Filed—July 20, 1977)

SUPREME COURT OF NEW JERSEY

C-901 SEPTEMBER TERM 1976

JOSE YI, MANNY DEPARA, etc.,

Appellants-Petitioners,

vs.

FRED G. BURKE, Commissioner of Education, *et al.,*

Respondents-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 20th day of July, 1977.

FLORENCE R. PESKOE
Clerk

A True Copy

FLORENCE R. PESKOE
Clerk

Supreme Court, U. S.
FILED
AUG 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

GREENBERG & MELLK,
Attorneys for Respondents, New Jersey Education Association, Paterson Education Association, Camden Education Association, Education Association of Passaic, Newark Teachers Association, West New York Education Association, Union City Education Association, New Jersey Corporations, Jose Yi, and Manny DePara,
28 West State Street,
Trenton, New Jersey 08608.

WILLIAM S. GREENBERG,
Of Counsel.

DAVID ARRAJJ,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I—Certiorari should be denied because the *Younger* v. *Harris* doctrine is clearly inapplicable to this case	5
II—The decision below does not conflict with *England* v. *Louisiana State Bd. of Medical Examiners*	16
III—The holding of the Court of Appeals that where simultaneous state and federal actions upon the same subject matter are maintained pursuant to *England* v. *Louisiana State Bd. of Medical Examiners*, there is no bar to later federal litigation of constitutional claims not raised in the state court does not create a conflict among the circuit courts	17
CONCLUSION	19
APPENDIX:	
I —Notice of Appeal to the Superior Court of New Jersey, Appellate Division Dated October 12, 1976	1a
II—Statement of Items Comprising the Record on Appeal to the Superior Court of New Jersey, Appellate Division Dated November 12, 1976	3a

PAGE

Cases Cited

American Trial Lawyers Assoc. v. N.J. Supreme Court, 126 N.J. Super. 577, 316 A. 2d 19 (App. Div.), aff'd, 66 N.J. 258, 330 A. 2d 350 (1974) 11

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970) 5, 8, 9

Consolidated Coal Co. v. Kandle, 105 N.J. Super. 104, 251 A. 2d 295 (App. Div.), aff'd o.b., 54 N.J. 11, 252 A. 2d 403 (1969) 11

Cornwell v. Ferguson, 545 F. 2d 1022 (5th Cir. 1977) 17, 18

Ellis v. Dyson, 421 U.S. 426, 443 (1975) 6

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) 2, 5, 8-10, 12-18

Gerstein v. Pugh, 420 U.S. 103 (1975) 6

Gibson v. Berryhill, 411 U.S. 564, 577 (1973) 12

Government and Civic Employees Organizing Comm., C.I.O. v. Windsor, 353 U.S. 364 (1957) 8, 15

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 5, 7-10

In re Gastman, 147 N.J. Super. 101, 370 A. 2d 866 (App. Div. 1977) 11

In re Matter of Public Hearings, 142 N.J. Super. 136, 361 A. 2d 30 (App. Div. 1976) 11

Juidice v. Vail, 430 U.S. 327 (1977) 2, 5, 8, 9

Kugler v. Helfant, 421 U.S. 117, 124 (1975) 12

Lake Carriers Assoc. v. MacMullen, 406 U.S. 498 (1972) 6

PAGE

Mitchum v. Foster, 407 U.S. 225 (1972) 10

Monroe v. Pape, 365 U.S. 167, 183 (1961) 5, 6

Railroad Comm'n. of Texas v. Pullman, 312 U.S. 496 (1941) 13-15

Red Fox v. Red Fox, 564 F. 2d 361 (9th Cir. 1977) 17

Steffel v. Thompson, 415 U.S. 452, 475 (1974) 7

Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 6

Townsend v. Sain, 372 U.S. 293, 312 (1963) 12

Trainor v. Hernandez, 431 U.S. 434 (1977) 5, 7-9, 12

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 9

Williams v. Washington, 554 F. 2d 369 (9th Cir. 1977) 17

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 6

Wooley v. Maynard, 430 U.S. 750 (1977) 8

Younger v. Harris, 401 U.S. 37 (1971) 2, 5-9, 12-14, 17

Statutes Cited

Indian Civil Rights Act 17

N.J.S.A. 52:14B-1 (New Jersey Administrative Procedure Act) 4

42 U.S.C. §1983 .....2, 5, 6, 10, 17, 18

New Jersey Court Rules Cited

Rule 2:2-3(a)(2) 3

Rule 2:4-1(b) 14

PAGE

Rule 2:5-1(e) 3
Rule 2:5-1(f) 4
Rule 2:5-4(b) 4, 10
Rule 2:5-5(b) 4, 11
Rule 2:6-2 4
Rule 2:8-1 3
Rule 2:9-7 3
Rule 2:9-8 3

Regulations Cited

N.J.A.C. 6:11-8.8 3
N.J.A.C. 6:11-8.9 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Jurisdiction

The jurisditional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the *Younger* v. *Harris* abstention doctrine, which this Court has determined is not limited in application to pending state criminal or quasi-criminal proceedings in *Juidice* v. *Vail,* is applicable when there is pending a prior state civil proceeding, initiated by the federal plaintiffs, in the form of an appellate proceeding to review administrative rulemaking, which involves some, but not all federal claims raised in the subsequent federal suit?

2. Whether this Court's decision in *England* v. *Louisiana State Bd. of Medical Examiners* precludes a federal litigant who has, without making an explicit reservation on the State record raised some of his federal claims in the state court and who has not sought review in this Court of the untavorable state decision, from litigating federal claims in the federal district court which were not fully and freely litigated in the state proceeding?

3. Does the doctrine of res judicata bar a federal plaintiff in a suit under 42 U.S.C. §1983 from litigating federal issues which were not, but could have been, raised in a simultaneously pending state proceeding initiated by the federal plaintiff which has not yet resulted in a final judgment?

Statement of the Case

The Respondents accept the Statement of the Case set forth in the Petition except insofar as it is supplemented, clarified, or corrected below.

The procedural background of this case commenced with the filing of a Notice of Appeal by Respondents Yi and

DePara with the Appellate Division of the Superior Court of New Jersey, on October 14, 1976, from amendments to administrative regulations of the New Jersey State Board of Education relating to the certification of Bilingual and Bicultural teachers and teachers of English as a second language. N.J.A.C. 6:11-8.8 and 8.9 (App. I). The amendments sought to be reviewed were promulgated effective September 15, 1976. Id. This appeal was instituted pursuant to N.J. Court Rule 2:2-3(a)(2) which provides that challenges to the final actions of state administrative agencies shall be by way of appeal as of right in the Superior Court, Appellate Division.

The three applications for a stay of the implementation of the challenged regulations mentioned in the Petition were separate and distinct only in a strictly arithmetic sense. The first two of these were made simultaneously on October 13, 1976, the same day the Notice of Appeal was forwarded for filing pursuant to N.J. Court Rule 2:5-1(e). One of these was a motion for a stay of the regulations addressed to the Appellate Division pursuant to N.J. Court Rule 2:9-7. (See App. D). The other was an application addressed to a single judge of the Appellate Division for a stay pending disposition of the motion by a full panel of the Appellate Division pursuant to N.J. Court Rule 2:9-8 (see App. C). The latter application to a single judge was denied on the same day it was made (App. C). The motion for a stay addressed to the Appellate Division as a whole was denied without prejudice to its resubmission on November 17, 1976, for failure to comply with the requirement that such motions be accompanied by supporting briefs, set forth in N.J. Court Rule 2:8-1 (App. D). This motion was resubmitted on April 14, 1977, after the appellants' brief on the merits had been filed on March 28, 1977, and was granted in part on April 25, 1977 (App. E).

The record on the appeal, certified and filed by the State Board of Education itself on or about November 12, 1976, pursuant to N.J. Court Rule 2:5-4(b), consisted of the regulations at issue as amended, a four-page internal State Department of Education memorandum, a four-page document entitled "Rationale for Equivalency of Experience Amendments to the Bilinqual/Bicultural and ESL Certification Regulations," and a one-page directive of the State Board of Education regarding the development of the challenged regulations (see App. II). Although supplementation of the record is possible on such an appeal pursuant to N.J. Court Rule 2:5-5(b), such supplementation is at the discretion of the Appellate Division and is available only by way of the Court's order, upon its motion or that of a party.

No factual or legal grounds for the appeal were specified in the Notice of Appeal (App. I) as implied by Respondents, the contents of which Notice were dictated by N.J. Court Rule 2:5-1(f). Indeed, the issues on the appeal were not specified until the filing of the appellants' brief on March 28, 1977. See N.J. Court Rule 2:6-2. Raised in that brief were the state law grounds of estoppel and failure of compliance with the New Jersey Administrative Procedure Act (N.J.S.A. 52:14B-1, et seq.) with regard to the promulgation of the regulations as well as federal procedural due process and equal protection issues (see App. F). The decision of the Appellate Division, isued on July 12, 1977, devoted exactly one paragraph to appellants' constitutional claims (App. F).

ARGUMENT

I

Certiorari should be denied because the *Younger* v. *Harris* doctrine is clearly inapplicable to this case.

The relationship between this case and the abstention doctrine set forth in *Younger* v. *Harris,* 401 U.S. 37 (1971), and amplified in *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975), *Juidice* v. *Vail,* 430 U.S. 327 (1977) and *Trainor* v. *Hernandez,* 431 U.S. 434 (1977), is so remote it approaches nonexistence. No amount of complaining by the Petitioners can change that plain fact.

First of all, no affirmative state enforcement of any important state interest was involved in the appeal pending in the New Jersey courts when the federal action was filed here. See *Trainor* v. *Hernandez,* supra. Indeed, like the situations in *Huffman, Juidice* and *Trainor,* the pending state action was an appeal (not a "suit") initiated by the federal plaintiffs, (Respondents here) themselves. The appeal was instituted to review a rulemaking action of the Petitioners who were obliged to defend it. Hence, no affirmative vindication of any important state interest was at all at work in that appeal. In fact, it is obvious that the state appeal need not have been pursued at all in order for the appellants there, as federal litigants, to have successfully invoked the District Court's jurisdiction pursuant to 42 U.S.C. §1983. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961); cf. *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964); *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Engineers,* 398 U.S. 281 (1970). The only substantial question in this case therefore involves "election of judicial fora" by the federal plaintiffs who

were simultaneously state appellants, rather than potential interference with the state's enforcement of its legitimate policies in the state judiciary. *Ellis* v. *Dyson,* 421 U.S. 426, 443 n.9 (1975) (Powell, J., dissenting).

The existence of this option on the part of the Respondents renders this case much more similar to *Gerstein* v. *Pugh,* 420 U.S. 103 (1975). There, the federal plaintiffs were state criminal defendants who obtained injunctive relief against pretrial dentention without a prompt hearing. The issues of the legality of such detention were not available to the plaintiffs by way of defense to the criminal prosecutions, but they clearly had the option, which they chose to forego, of a separate state civil action for declaratory and injunctive relief. Nonetheless, this Court found no *Younger* problem inherent in a federal injunction against such detention, the remedy opted for. Id. at 108 n. 9; see also *Lake Carriers Assoc.* v. *MacMullan,* 406 U.S. 498 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). Federal plaintiffs have never been required by this Court to exhaust state judicial remedies to vindicate federal constitutional claims as a prerequisite to raising those claims in a federal action under 42 U.S.C. §1983. See *Monroe* v. *Pape,* 365 U.S. 167 (1961). The mere fact that the Respondents chose the option of submitting some, but not all (see argument II, *infra*), of their federal claims in a state appeal, while simultaneously pursuing the federal action, should not deprive them of a federal forum under *Younger.* Such a result would render the timing of the filing of the state action determinative of the availability of a federal forum; for only recently in *Town of Lockport* v. *Citizens for Community Action,* 430 U.S. 259 (1977) this Court held the *Younger* doctrine inapplicable where a state suit was filed by federal plaintiffs *after* commencement of the federal action. See also

Steffel v. *Thompson,* 415 U.S. 452, 475 n. 22 (1974). Surely the state's interest in its laws relating to the type of government of its counties in *Lockport,* which was the subject of both suits there, is at least equal to that of the state here in regulating the qualifications of its teachers.

This state interest here was in fact totally unaffected by the federal action below. It will be recalled that the enforcement of the regulations at issue in both the state appeal and the federal suit was stayed as to those teachers ineligible for certification under them by the New Jersey Appellate Division pending disposition of the appeal by order dated April 25, 1977 (App. E). This determination had nothing whatsoever to do with the federal action. No injunction, preliminary or otherwise, was ever issued by the District Court against implementation of the challenged regulations. Thus, no disruption of state regulatory procedures was caused by the pendency of the federal action here. Quite simply there was no intervention by the federal court into the state regulatory scheme, but instead, by the state court itself. Under these circumstances, where the state regulatory process was unaffected, the principles of equity, comity and federalism underlying the *Younger* doctrine are not involved to any significant degree. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 604-605 (1975).

Nor does the mere fact that the state was here a party to both actions affect the above analysis. The state action was not an enforcement proceeding brought by the state "in its sovereign capacity" as in *Trainor* v. *Hernandez,* 431 U.S. 434, 446 (1977) and *Huffman* v. *Pursue Ltd.,* supra.

Moreover, the pendency of the federal suit here implicated no interference with the state court proceedings them-

selves. No injunction against the state proceeding was sought or granted as in *Juidice* v. *Vail,* 430 U.S. 327 (1977). Nor was there sought or granted any federal interference with the enforcement of any affirmative relief granted the state by the state court without exhaustion of state appellate remedies as in *Huffman,* and *Trainor.* See *Wooley* v. *Maynard,* 430 U.S. 705 (1977) (*Younger* does not apply where federal litigant who did not appeal past state convictions sought prospective relief against threatened future prosecution); cf. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970).

Similarly, the character of the federal litigation here, as limited by the decision of the Third Circuit Court of Appeals to federal claims not fully and freely litigated in the state appeal (App. A at 27a-29a), did not import any foreclosure of the state court from considering the challenged regulations in light of the appellants' federal claims. See *Trainor* v. *Hernandez,* 431 U.S. at 445. On the contrary, the appellants' chief constitutional claims were in fact set forth in their brief to the Appellate Division, in accordance with *Government and Civic Employees Organizing Comm., C.I.O.* v. *Windsor,* 353 U.S. 364 (1957) as clarified in *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964). For this same reason, there did not inhere in the situation in this case, as tailored by the Court of Appeals to reflect what should have been done by the District Court instead of dismissal, any serious duplication of proceedings or any negative reflection at all on the state court's ability to adjudicate federal constitutional claims, within the limitations of New Jersey appellate procedure relating to the scope of review of administrative action. See *Huffman* v. *Pursue Ltd.,* 420 U.S. at 603-604. Indeed, at the time of the Court of Appeals' decision below reinstating Respondents' federal suit on May 3, 1978, all state proceedings, including exhaustion of appellate remedies, had been completed almost a year before (see App. G). See id., 420 U.S. at 608-609. There was, in fact no pending state proceeding at the time as in *Trainor* and *Juidice.*

Even if attention should more properly be focused upon the situation at the time of the District Court's dismissal of the federal action, there did not inhere in that situation, as we have demonstrated above, any of the factors identified by this Court as calling into play the *Younger* doctrine. At that time, the state and federal courts had concurrent jurisdiction to determine the claims, of the Respondents appropriately submitted to each, and neither court was free to prevent any of the parties from pursuing appropriate claims in both courts simultaneously. See *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970); *Vendo Co.* v. *Lektro-Vend Corp.,* 433 U.S. 623 (1977). In such a situation, equity, comity and federalism are more than satisfied by adherence to this Court's directions in *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), which is exactly what the Court of Appeals directed below (see App. A, at 21a-22a; 27a-29a). Simultaneous state and federal litigation by the same plaintiffs, involving separate issues pursuant to *England* avoids unnecessary duplication, involves no federal interference with state court proceedings, and does not prevent the state from providing a forum to determine both state and federal claims, hence entailing no negative reflection on the state courts. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 603-604 (1975).

The fact that the state is a party in both actions and that the subject matter thereof concerns state regulations in which the state is obviously interested does not vitiate this analysis. Mere federal judicial review of state executive action by a federal court, expressly authorized by Congress

in 42 U.S.C. §1983, has never been thought to offend equitable principles of comity and federalism. Cf. *Mitchum* v. *Foster,* 407 U.S. 225 (1972). The state always has a recognizable interest in its official functions. But the final arbiter of the constitutional legitimacy of the execution of those functions is the judiciary, and, according to express Congressional intent, the federal judiciary. Id. Thus, the mere fact that a preliminary stay of the effect of the regulations was sought in the District Court here entailed no disruption of the state functions involved, either executive or judicial. Such a stay was first sought in the state courts and denied on procedural grounds rather than on the merits, and only once, not twice are represented by petitioners. Moreover, the District Court never seriously considered temporary injunction of the enforcement of the regulations at issue, even though counsel for Respondents indicated willingness to withdraw the state appeal entirely to avoid dismissal of the federal action (see App. B).

Verbal exaggeration of the amount of time and energy expended in the state proceeding cannot change the fact that it was merely an appeal from administrative rulemaking to an appellate court, bearing no resemblance at all to a trial. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 608-609 (1975). The only discovery involved was that voluntarily accorded by the State Board of Education in establishing the record on appeal. See N.J. Court Rule 2:5-4(b). That record consisted entirely of nine pages of documents (see App. II). No testimony was ever taken, and all determinations during the pendency of the appeal were made pursuant to the filing of appropriate papers without any hearing, except for oral argument of the merits of the appeal (see App. F). Simply put, the state appeal presented the federal court with almost nothing to duplicate, even without limitation of the issues pursuant to *England.*

No disrespect for the state appellate court's ability to deal with federal constitutional issues is reflected in merely recognizing the limitations inherent in New Jersey Appellate procedure relating to the review of administrative action. The scant record described above (see App. II) could not have been readily supplemented by the appellants except with material evidence already known to them. See N.J. Court Rule 2:5-5(b); cf. *In re Gastman,* 147 N.J. Super. 101, 370 A.2d 866 (App. Div. 1977). Moreover, no discovery procedure or procedure for the taking of testimony to supplement the record is available except under the above rule which allows, in the court's discretion and by its order, "the taking of additional evidence and the making of findings of fact thereon by the agency below, or, in exceptional instances, by a judge of the Superior or county court . . ." N.J. Court Rule 2:5-5(b).

The obviously limited opportunity provided by this rule for building a factual record is exacerbated by the fact that under New Jersey law, no hearing is generally required in administrative rulemaking proceedings in the first place (see *American Trial Lawyers Assoc.* v. *N.J. Supreme Court,* 126 N.J. Super. 577, 316 A.2d 19 (App. Div.), aff'd, 66 N.J. 258, 330 A.2d 350 (1974)), and even where a hearing requirement is statutorily imposed, the provision of a forum to the public to be heard suffices and no adjudicatory hearing is necessary. See *In re Matter of Public Hearings,* 142 N.J. Super. 136, 361 A.2d 30 (App. Div. 1976). The factual basis for the requirements imposed by administrative regulations is presumed without the necessity of fact finding by the agency. *Consolidation Coal Co.* v. *Kandle,* 105 N.J. Super. 104, 251 A.2d 295 (App. Div.), aff'd o.b., 54 N.J. 11, 252 A.2d 403 (1969).

Such procedural conditions, inherent in New Jersey administrative rulemaking and in the appellate review thereof can hardly be said to provide an adequate opportunity to vindicate constitutional claims in need of factual support. See *Trainor* v. *Hernandez,* 431 U.S. 434, 441 (1977). They certainly offer no adequate substitute for the "benefit of a federal trial court's role in constructing a record and making fact findings." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 416 (1964). It should not be forgotten, as this Court also noted in *England,* that constitutional claims typically turn upon factual findings. Id. at 416-417 (quoting *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963)). For all these reasons, it cannot be said that the state appeal adequately provided Respondents the opportunity of having their constitutional claims "fairly and fully" adjudicated in that proceeding. *Kugler* v. *Helfant,* 421 U.S. 117, 124 (1975); *Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973). In short, the primary prerequisite for the application of the *Younger* doctrine (see *Trainor, supra,* 431 U.S. at 441), was wholly absent in this case, not because of any lack of ability or sensitivity to constitutional claims on the part of the state appellate court, but simply because of the total lack of fact finding machinery in New Jersey's administrative rulemaking process and appellate procedures for the review thereof.

In sum, this case bears no resemblance whatsoever to any of the progeny of *Younger* v. *Harris* in the civil area in which this Court has progressively restated, refined and extended the *Younger* doctrine over the past few years. As we have demonstrated, none of the factors calling into play the principles of equity, comity and federalism underlying the *Younger* doctrine, which have been so recently and carefully elaborated by this Court, are present in this case, except the fact of the simultaneous maintenance of state and federal proceedings in each of which the state was a party. Indeed, what the Petitioners complain of here is the wholly proper respect paid by the Court of Appeals below to this Court's exhaustive adumbration of the factors implicating *Younger* abstention in the civil area by its refusal to enter uncharted waters in a case in which none of those factors is fairly and concretely identifiable.

It is true that the simultaneous maintenance of state and federal proceedings challenging state statutes or regulations is not unusual. Such a pattern is fairly mandated by the abstention doctrine of *Railroad Comm'n. of Texas* v. *Pullman,* 312 U.S. 496 (1941) and its progeny. The position advanced by the Petitioners would subject all private litigants who in good faith endeavor to settle state law issues in state courts to satisfy *Pullman* while maintaining federal actions, to almost certain *Younger* dismissal if any federal claims are raised in the state action. Indeed, under the facts of this case, this is the only position open to Petitioners, who are, plainly, merely seeking reversal of the Court of Appeals. Far from presenting an opportunity to "clarify" *Younger* abstention, the facts of this case promise only to further the confusion manifested by Petitioner's argument.

II

The decision below does not conflict with *England* v. *Louisiana State Bd. of Medical Examiners.*

In *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), this Court reaffirmed the long standing principle that litigants who have properly invoked federal jurisdiction to consider federal claims ought

not to be compelled to accept a state determination of them. 375 U.S. at 415. The Court also recognized that litigants may elect to forego their right to a federal forum (375 U.S. at 412) and held that such a waiver occurs where "a party freely and without reservation submits his federal claims for decision by the state courts [and] litigates them there . . ." 375 U.S. at 419.

In the present case, Respondents desired to challenge new state regulations, in part on constitutional grounds. Recognizing the probability of *Pullman* abstention by the federal courts in the absence of an authoritative construction of the regulations, Respondents filed a Notice of Appeal in the New Jersey Superior Court, Appellate Division, as they were required to do within 45 days of the promulgation of the amendments to the regulations. N.J. Court Rule 2:4-1(b). Because of this time limit, Respondents could not wait to be relegated to a state forum by a federal court on *Pullman* grounds, without risking foreclosure of their opportunity to appeal to the state court.

Following the later filing of their federal action, Respondents were faced simultaneously with the requirement that they file their brief in the state appellate court and with a motion to dismiss the federal suit on both *Younger* and *Pullman* grounds. (See App. B). Respondents' state brief was filed on March 28, 1977, and their federal suit was dismissed in an oral opinion by the District Court on April 4, 1977.

Having been ejected from the federal forum at the behest of Petitioners, Respondents had no choice except to refrain from explicitly reserving on the state record their federal claims for later submission to the federal court. The state appellate court was at that time the only forum available to Respondents for the submission

of any claims, state of federal, with regard to the regulations at issue. Respondents had no way of predicting the outcome of their appeal from the District Court dismissal and thus, whether a federal forum would ever again become available to them.

Under these circumstances, to assert that the record shows the unequivocal and freely chosen litigation of federal claims by Respondents in the state appellate court is utterly absurd. And in any event, the Petitioners themselves admit the correctness of the Court of Appeals' determination that not all of the federal claims embodied in Respondents' federal complaint were submitted to the state appellate court (see App. A at 28a). The Court of Appeals, in remanding to the District Court for a determination as to whether the federal claims submitted in the state appeal were fully and freely litigated, merely recognized the obvious fact that under the circumstances outlined above, the resolution of that question presents difficult factual issues (App. A at 29a).

There was no inconsistency whatsoever between this determination and the pronouncements of this Court in *England,* supra. There, this Court set forth guidelines to be utilized by those litigants who, as here, are faced with *Pullman* abstention and the concomitant obligation to obtain an authoritative state court construction of state regulations in light of pertinent constitutional objections. See *Government and Civic Employees Organizing Comm., C.I.O.* v. *Windsor,* 353 U.S. 364 (1957). The Court deemed that the surest way to avoid the conclusion that federal claims submitted to the state court in satisfaction of *Windsor* were actually litigated was for the litigant to place an explicit reservation on

the state record such that "he is exposing his federal claims there only for the purpose of complying with *Windsor*." 375 U.S. at 421. The Court made it crystal clear, however, that such an explicit reservation is not absolutely necessary:

> *Such an explicit reservation is not indispensable*; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts.

375 U.S. at 421 (emphasis added and footnote omitted).

Thus, there is simply no inconsistency between the disposition of the Court of Appeals here in the absence of such an explicit reservation by Respondents and this Court's decision in *England*. *England* does not require such a reservation, but merely recognizes that its presence would make the federal determination of what was "voluntarily" and "fully" litigated in the state court much easier. The Petitioners' assertion that the Court of Appeals engaged in "interpretation" of *England* is patently ridiculous. The court merely read literally the plain language quoted above. No question worthy of this Court's attention inheres in that reading.

III

The holding of the Court of Appeals that where simultaneous state and federal actions upon the same subject matter are maintained pursuant to *England* v. *Louisiana State Bd. of Medical Examiners*, there is no bar to later federal litigation of constitutional claims not raised in the state court does not create a conflict among the circuit courts.

That a conflict exists among several of the Courts of Appeals upon the abstract *res judicata* issue projected in argument C. of the Petition is not denied. This fact was directly recognized by the Court of Appeals below (App. A at 22a-26a). But although the Court stated its holding on the point in terms of a choice of the rule that prior state judgments preclude later federal litigation only with respect to those constitutional issues actually litigated before and decided by the state courts, it is clear that the facts of this case render it an inappropriate vehicle to resolve the admitted conflict.

None of the cases cited by either the Petitioner or the Court of Appeals as espousing the opposite rule in cases involving 42 U.S.C. §1983 involved the maintenance of simultaneous state and federal actions because of *Pullman* abstention problems, except one, *Cornwell* v. *Ferguson*, 545 F.2d 1022 (5th Cir. 1977).* In *Cornwell*, as here, simultaneous state and federal actions were maintained. Id. at

---

**Red Fox* v. *Red Fox*, 564 F.2d 361 (9th Cir. 1977) involved simultaneous actions but the federal action was under the Indian Civil Rights Act. In *Williams* v. *Washington*, 554 F.2d 369 (9th Cir. 1977), the determinative issue was whether the District Court had properly dismissed the federal action under the *Younger* doctrine. The Court of Appeals affirmed the District Court on this point.

1023. The District Court abstained pending termination of the state proceedings. Id. at 1023-1024. When the state proceedings were completed, including an appeal, the District Court dismissed the federal action. Id. at 1024. The Court of Appeals affirmed, holding specifically under *England* v. *Louisiana State Bd. of Medical Examiners* that all of the constitutional claims in the federal action has been "freely and without reservation" litigation in the state action and decided upon there. Id. at 1025. Thus, although the Court paid lip service to traditional *res judicata,* the ground of decision was actually the species of collateral estoppel adumbrated in *England.* The only genuine difference between *Cornwell* and the present case, then, is that the *England* factual issue of whether constitutional issues were fully and freely litigated was determined differently.

Hence, it is clear that this case hardly brings the *res judicata* issue into sharp focus. Whatever the justification for applying such a rule in §1983 cases where an unfavorable state judgment is rendered on the same cause before the federal action is instituted, the propriety of its application in cases covered by *England,* and in the face of the preclusion test there set forth by this Court requiring actual state litigation of the issues, is obviously doubtful. In other words, this case, which is of the latter type, has no factual counterpart among those cases cited in the Petition in which traditional *res judicata* principles were applied to preclude actions under 42 U.S.C. §1983. This case is, accordingly, a totally unsuitable vehicle for resolution of the conflict embodied in those cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GREENBERG & MELLK
Attorneys for Respondents
By: WILLIAM S. GREENBERG
A Member of the Firm

[APPENDICES FOLLOW]

APPENDIX I

Notice of Appeal to the Superior Court of New Jersey, Appellate Division Dated October 12, 1976

(Filed—October 14, 1976)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

JOSE YI, MANNY DEPARA, Individually and as representatives of class comprised of all Bi-Lingual Bi-Cultural and English as a second language, Teachers of the State of New Jersey,

Plaintiff

v.

FRED G. BURKE, Commissioner of Education, and the Board of Education of the State of New Jersey,

Defendant.

PLEASE TAKE NOTICE that the Plaintiffs hereby give Notice that they will Appeal to the Superior Court of New Jersey, Appellate Division the following:

1. Amendments to N.J.A.C. 6:11-8.9 concerning the teaching of English as a second language said amendments having been adopted September 15, 1976.

Appendix I

2. Amendments to N.J.A.C. 6:11-8.9 concerning Bi-Lingual/Bi-Cultural Education adopted September 15, 1976. This Appeal is taken from the action of the Commissioner of Education and from the New Jersey State Board of Education to the Superior Court of New Jersey, Appellate Division.

The record of proceedings has been ordered by the undersigned as evidence by documents attached hereto and made part hereof, pursuant to RR 2:5-1 (f).

MICHAEL D'ALESSIO, JR.

Dated: October 12, 1976

APPENDIX I I

Statement of Items Comprising the Record on Appeal to the Superior Court of New Jersey, Appellate Division Dated November 12, 1976

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—DOCKET NO. A-540-76

Civil Action

JOSE YI, MANNY DEPARA, Individually and as representatives of class comprised of all Bi-Lingual Bi-Cultural and English as a second language, teachers of the State of New Jersey,

Appellants,

v.

FRED G. BURKE, Commissioner of Education, and the Board of Education of the State of New Jersey,

Respondents.

To: CLERK OF THE COURT
MICHAEL D'ALESSIO, JR., ESQ.
19 Hutton Avenue
W. Orange, New Jersey 07052

SIRS:

PLEASE TAKE NOTICE that the State Board of Education hereby certifies and files pursuant to R. 2:5-4(b) the State-

Appendix II

ment of Items Comprising the Record on Appeal in the above case. The items comprising the record are as follows:

1. Amendments to N.J.A.C. 6:11-8.8 adopted by order of State Board of Education filed and effective September 15, 1976. R. 1976 d. 288.

2. Amendments to N.J.A.C. 6:11-8.9 adopted by order of State Board of Education, filed and effective September 15, 1976. R. 1976 d. 289.

3. Memorandum from Catherine Havrilesky to Dr. Fred G. Burke, dated June 23, 1976 reported of meeting held June 14, 1976 and meeting held June 21, 1976 which was attended by representatives of bilingual interest groups at invitation of Department of Education to discuss equivalency of experience for certification of teachers in bilingual/bicultural and English as a second language programs in New Jersey.

4. "Rationale for Equivalency of Experience Amendments to the Bilingual/Bicultural and ESL Certification Regulations" developed by representatives of bilingual interest groups convened at invitation of State Department of Education.

5. Directive of State Board of Education dated July 14, 1976 concerning development of guidelines for implementing certification regulations and directing evaluation of alternatives in establishing equivalency of experience in bi-

Appendix II

lingual/bicultural and English as a second language program in New Jersey.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondents,
Commissioner and State
Board of Education
By: SUSAN P. GIFIS
Deputy Attorney General

DATED: November 12, 1976

Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Petitioners, Fred G. Burke, Commissioner of Education of the State of New Jersey, Ruth H. Mancuso, President of the New Jersey State Board of Education and the New Jersey State Board of Education,
State House Annex,
Trenton, New Jersey 08625.

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel.

MARK SCHORR,
Deputy Attorney General,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

In the brief they filed in opposition to the petition for a writ of certiorari, respondents never disputed that the issues underlying this case are worthy of the Court's consideration. Instead, they argue that this is not the proper case for raising these issues. Respondents deem a reply brief necessary because these arguments are based on

either a misrepresentation of the procedural posture of the proceedings below or a misconstruction of the applicable law.

Non-intervention under *Younger* v. *Harris,* 401 U.S. 37 (1971), has as its underpinnings the principles of comity, equity and federalism and represents a recognition by the federal judiciary that a state and its courts will function best when they are left to discharge their own functions according to their own procedures. And application of the doctrine does not depend, as respondents insist that it does, on the quality of review provided in the state forum or the availability of a specific type of fact-finding machinery. This Court in *Juidice* v. *Vail,* 430 U.S. 327, 337 (1977), made it crystal clear that non-intervention under *Younger* is appropriate where parties have:

> "an *opportunity* to present their federal claims in a state proceeding. No more is required to invoke *Younger* abstention. There is no support in [*Gerstein* v. *Pugh,* 420 U.S. 103 (1975)] or in other cases for the District Court's belief that the state courts must have an *actual* hearing . . . in order for *Younger* and *Huffman* to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." (emphasis original) (footnotes omitted) (citation omitted).

Furthermore, it is clear that the New Jersey rules of court make provision for a litigant to go beyond the bare *opportunity,* the existence of which is in any event sufficient to trigger *Younger* non-intervention. Respondents as much as admit this, citing several times in their brief New

Jersey procedures whereby a record may be supplemented by either testimonial or documentary evidence. N.J.R. 2:5-5(b). That respondents never resorted to these procedures is not because of their inherent limitations, but rather because there was no need. Involving as it does what is essentially a facial challenge to administrative regulations, this case does not raise issues of fact and there was no reason for respondents to create any further record. Only after having been rebuffed by New Jersey courts under procedures they themselves invoked, respondents now attack these procedures as inadequate and say they were deprived of fact-finding which was clearly open to them.

As for respondents' description of the procedural posture of the two parallel actions involved in this case at the time the federal suit was dismissed, it is nothing more or less than misrepresentation. First, the suits did not involve separate issues as respondents now suggest. Not only were the federal issues raised in both the state and federal courts identical, but they were supported by virtually identical legal argument. The Court of Appeals below explicitly recognized that (App. A at 5a n.6). Furthermore, it is clear that respondents did not expose their federal claims to judgment in the state proceeding because they believed *England* v. *Louisiana Bd. of Medical Examiners,* 375 U.S. 411 (1964), required them to do so. In fact, they injected their constitutional issues into the state proceeding, in a brief filed on March 28, 1977, *before* the matter was dismissed by the district court on April 4, 1977. They did so without making a reservation of rights under *England.* Thus, respondents' current claims that they raised their federal claims in the state proceeding because they had no choice is wholly without substance.

Similarly without substance, and especially curious, is respondents' contention that they brought the state action because they feared that the district court would abstain under *Railroad Comm'n* v. *Pullman*, 312 U.S. 496 (1941), and because New Jersey court rules required that they challenge the regulations within 45 days of their promulgation. It is doubtful that they proceeded as they did for those reasons. For *Pullman* abstention has never depended on whether there was a state action in progress. And it is well settled that the 45-day time limit respondents cite has no application where, as here, the constitutionality of regulations is involved. *McKenna* v. *New Jersey Highway Auth.*, 19 N.J. 270, 276, 116 A.2d 29 (1955).

Finally, mention should be made of respondents' assertion, reiterated several times in their brief, that *Younger* has no application here because no state interests were affected by the federal action they instituted. By their argument, they ignore that this case implicated substantial state interests—New Jersey's interest in the qualifications of the teachers who teach in its public schools and the considerable time and energy its courts had invested in the state action—and that there was no interference with state functions simply because the district court refused to intervene and thereby avoided precisely the type of federal-state tension a federal court seeks to avoid when it invokes *Younger*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Petitioners, Fred G. Burke, Commissioner of Education of the State of New Jersey; Ruth H. Mancuso, President of the New Jersey State Board of Education; and the New Jersey State Board of Education.